IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 501

DUKE WATER CO.,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California and to the Public Utilities Commission of the State of California.

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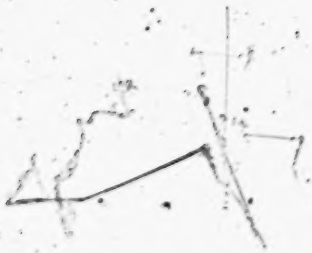

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No. .....

DYKE WATER CO.,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California and to the Public Utilities Commission of the State of California.

Petitioner prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of California affirming Decision No. 49828 of the Public Utilities Commission of the State of California.

Opinions Below.

Decision No. 59828 of the Public Utilities Commission of the State of California is reported at 57 Cal. P.U.C. 586 (1960) [Appendix, Ex. "A," *infra*, p. 1.] The decision of the Supreme Court of the State of California, affirming the aforesaid decision of the Public Utilities Commission is reported at 56 A. C. 95 (1961) [Appendix, Ex. "G," *infra*, p. 67.] The pro-

posed report of the hearing officer is unreported, and is printed in the Appendix hereto. [Appendix, Ex. "I," *infra*, p. 107.]

Jurisdiction.

The jurisdiction of the Supreme Court of the United States to review this cause on petition for a writ of certiorari rests on the provisions of 28 U. S. C. §1257(3). Petitioner has fully exhausted all remedies available in the lower courts. Timely petitions for rehearing were filed before the Public Utilities Commission of the State of California and the Supreme Court of the State of California. [Appendix, Ex. "B", *infra*, p. 12; Appendix, Ex. "H," *infra*, p. 97.] The petition for rehearing before the Supreme Court of the State of California was denied by order of the California Supreme Court on July 19, 1961, and the decision of the Supreme Court of the State of California sought to be reviewed is now final. The federal questions herein were raised by the pleadings at all stages of the proceedings below. [Petition for Rehearing before Commission, Appendix, Ex. "B", *infra*, p. 12; Petition for Writ of Certiorari or Review, Appendix, Ex. "D," *infra*, p. 24.]

Questions Presented.

Throughout the proceedings below, culminating in the order denying a petition for rehearing before the Supreme Court of the State of California, petitioner, Dyke Water Co., contended that the rates ordered by the respondent Commission are confiscatory and constitute a denial of due process of law to petitioner; that the procedure employed by the respondent Commission constituted a denial of due process of law to petitioner; and that the opinion and order of the re-

spondent Commission in Decision No. 59828 [Appendix, Ex. "A," *infra*, p. 1] constituted a denial of due process of law to petitioner. The questions presented herein include the following:

(a) Are the rates ordered by the respondent Commission and the order of the respondent Commission with respect to metering confiscatory, and do they constitute a denial of due process of law to petitioner?

(b) Did the Commission err in refusing rehearing for the purpose of presenting evidence of the *actual* results of petitioner's operation before the issuance of the respondent Commission's Decision No. 59828, instead of the mere estimates which were all that had been available at the time of hearing, and if so, was the petitioner thereby denied due process of law?

(c) Did the respondent Commission err in adopting findings of the hearing officer but rejecting his conclusions and adopting contrary conclusions and, if so, was the petitioner thereby denied due process of law?

(d) Did the respondent Commission err in not hearing oral argument of petitioner, and, if so, was the petitioner thereby denied due process of law?

(e) Was the order to install meters beyond the jurisdiction of the respondent Commission, and if so, does the order constitute a denial of due process of law to petitioner?

(f) Was the respondent Commission's order directing the installation of meters so unreasonable as to constitute a denial of due process of law to petitioner?

Statutes Involved.

The relevant sections of U. S. C. §1257 read as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) by writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

The relevant section of the 14th amendment to the United States Constitution reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant sections of the California statutes contained in the Public Utilities Code of the State of California are found in the exhibits attached hereto. [Decision of the California Supreme Court, Appendix, Ex. "G." *infra*, p. 67.]

Statement of the Case.

In August 1957, petitioner applied to the respondent Commission for authority to increase its rates which had been in effect since 1952. In December 1957, on the basis of an express finding of a financial emergency facing the petitioner, an interim order was made by the Commission authorizing a temporary rate in-

crease for petitioner. Thereafter numerous and comprehensive public hearings were held until May 8, 1959 with respect to the application and various practices of petitioner.

At the conclusion of the hearings, examiner Stewart C. Warner, the hearing officer, was directed by the respondent Commission to file a proposed report. This proposed report, including the hearing officer's recommended order is printed in the Appendix hereto. [Appendix, Ex. "I," *infra*, p. 107.] In substance the recommended order of the hearing officer was that the petitioner's interim rate increase be made permanent and that petitioner commence installation of meters on existing connections out of moneys to be provided from a $.75 monthly surcharge for each residential user until the metering program was completed. Thereafter, no action was taken by the Commission as to the application and investigation for 9 months and 26 days, until March 22, 1960. Then the respondent Commission rendered Decision No. 59828. [Appendix, Ex. "A," *infra*, p. 1.] The decision of the respondent Commission adopted findings of the hearing officer's proposed report but the order of the respondent Commission was diametrically opposed to the hearing officer's recommended order. In substance, the Commission's order required petitioner to *reduce* its rates to those in effect in 1952 and to immediately institute a program of metering in excess of 400 meters a month, without the benefit of any rate increase or funding of moneys from any special surcharge. Upon receipt of the decision, petitioner immediately filed with the respondent Commission a petition for rehearing. [Appendix, Ex. "B," *infra*, p. 12.] The petition, supported by affidavits, sought an opportunity to present

to the Commission the then available evidence relevant to the application and investigation and petitioner's ability to comply with the order. The petition for rehearing was denied, without opinion, by the Commission's order of May 9, 1960. [Appendix, Ex. "C", *infra*, p. 23.]

The effect of the denial of the petition for rehearing was to deny petitioner an opportunity to present relevant and material evidence of the petitioner's *actual* operating expenses and revenues for 1958 and 1959, which was unavailable at the time of the hearings. The order also denied petitioner an opportunity to present evidence of the substantial increase in petitioner's costs of operations that had taken place since the proposed report was filed, as well as the substantial expenditures which would be required to comply with the order.

The order, petitioner contended, constituted a violation of the federal and California state constitutional guarantees against the taking of privately-owned property without compensation, in that the rates ordered therein constituted a confiscation of petitioner's property and in that the rates ordered therein did not allow a fair return on the property of petitioner as required by law.

A timely petition for writ of certiorari or review was filed by petitioner before the Supreme Court of the State of California which, on June 22, 1961, filed a decision reported at 56 A. C. 95 (1961) [Appendix, Ex. "G," *infra*, p. 67] the effect of which was to affirm the order of the respondent Commission in Decision No. 59828, a petition for rehearing of the aforesaid decision was denied on July 19, 1961 by the California Supreme Court.

Reasons for Granting the Writ.

The decision below should be reviewed by this Court to reverse the effect of an order of the Public Utilities Commission of the State of California which is confiscatory and denies to petitioner the protections guaranteed petitioner by the 14th amendment to the Constitution of the United States.

Although the California Supreme Court cited and quoted from *Federal Power Com. v. Hope Natural Gas Co.*, 320 U. S. 591, 602 (1944), the decision of the California Supreme Court in affirming the order of the Commission illustrates a complete disregard of the rationale of that and the other decisions of this Court. In the decisions of this Court, it has been repeatedly stressed that, constitutionally, the rate-making function for public utilities *may* be delegated to administrative agencies of the executive branch, and that a wide discretion is vouchsafed to such agencies, provided the statutory and constitutional requirements of a "just and reasonable" compensation are met. However, in the case at bar, by affirming the decision of the respondent Commission, the California Supreme Court ignored the clear import of the many cases decided by this court: that whatever the theory utilized by the agency setting the utilities rates, the end result must be just and reasonable. Moreover, as petitioner contended at all stages of the proceedings below, the rates ordered by the respondent Commission and the orders of the respondent Commission with respect to metering were based on estimates, the incorrectness of which the petitioner was never allowed to refute, although the evidence of actual operation was available and offered to the re-

spondent Commission before its order ever became effective.

In the proceedings below, the respondent Commission argued that petitioner would earn a rate of return somewhat more than "7% on a depreciated rate base of approximately $2,269,000.00." But proposed rates, based on that low rate base, were rejected by the hearing officer, and for good reason—it was never disputed that a local municipality had offered and petitioner had accepted the sum of approximately $7,000,000.00 for its system. This fact, coupled with the fact that petitioner's rates were reduced to the level prevailing in 1952 by the opinion and order of respondent Commission in Decision No. 59828, is the strongest evidence of the confiscatory nature of the respondent Commission's order.

> ". . . unreasonableness [may] be shown not by the method employed to formulate a rate base, but by the fact that the 'end result' of the commission's order interferes with the company's successful operation, its financial integrity, its ability to maintain credit and attract capital, and to compensate investors for risks assumed—in short, fails to provide a return sufficient to induce the utility enterprise to 'perform completely and efficiently its functions for the public.'" (*Market St. Ry. Co. v. Railroad Commission*, 24 Cal. 2d 378, 397 (1944); *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U. S. 287, 304-305, 314 (1933); *West Ohio Gas Co. v. Commission (No.*

D., 294 U. S. 63, 70 (1935); *Federal Power Com. v. Natural Gas Pipeline Co.*, 315 U. S. 575 (1942).)

In the case at bar, the hearing officer rejected the projected rate base which the Commission adopted, and on the basis of his findings rendered conclusions and made a recommended order which was rejected by the respondent Commission. Instead, the respondent Commission, although adopting the findings of the hearing officer, rendered an order which, petitioner submits, is unsupported by the record upon which it purports to rest.

A decision and order of the respondent Commission made without any or substantial evidence to support it, or based upon supposed facts, not introduced in evidence, is arbitrary and capricious, and is a denial of due process of law. (*I. C. C. v. U. P. Ry. Co.*, 222 U. S. 541, 547 (1912); *I. C. C. v. L. & N. Ry. Co.*, 227 U. S. 88, 91 (1913); *Ohio Bell Telephone v. Public Utilities Commission*, 301 U. S. 292, 302-304 (1937); see also, *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 477-491 (1951).)

Where an administrative body rejects the recommendations of its own examiner, its action is arbitrary and capricious and must be reversed by the courts as an order unsupported by substantial evidence, since evidence which might otherwise support the order is rendered *insubstantial* by the fact that the preponderance

of the evidence supports the recommendations of the hearing officer which the administrative body rejected. (See *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 F. 2d 786, 789-790 (7th Cir. 1951); *In re United Corporation*, 249 F. 2d 168, 178 (3rd Cir. 1957); *A. E. Staley Mfg. Co. v. National Labor Relations Board*, 117 F. 2d 868, 878 (6th Cir. 1941).) To deny the examiner's recommendations the probative force they would have in the conduct of affairs outside a courtroom would be to impede a rational inquiry into truth. The courts should accord the findings of the trial examiner and his conclusions, the relevance they reasonably command in answering the comprehensive question: whether the evidence supporting the order of an administrative agency is substantial? (*Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 496 (1951).)

The denial of petitioner's petition for rehearing before the respondent Commission denied petitioner a right afforded it by law to present evidence of its actual experience in relation to the rate hearings. (*Petitions of New England Tel. & Tel. Co.* 80 A. 2d 671, 116 Vt. 480 (1951); *Market St. Ry. Co. v. Railroad Commission, supra*, 24 Cal. 2d 378, 401 (1944); *Saunby v. Railroad Commission*, 191 Cal. 226, 231 (1923).)

By granting this petition for a writ of certiorari to review the decision of the California Supreme Court, affirming the decision of the respondent Commission, this court may, after a determination of cause on its

merits, render a definitive statement of the procedural and substantive requirements imposed by the Constitution of the United States under which the rate-making function may be exercised by the administrative agencies charged therewith by the respective governments of the States.

Conclusion.

It is respectfully submitted that the writ should be granted.

DYKE WATER CO.,
a California corporation,
By WILLIAM R. LANSDALE,
President.

ARLYNE L. LANSDALE,
RICHARD P. ROE,
CRIS S. KELLAS,
EDGAR P. BOYKO, and
FREDERICK L. SIMMONS,
By FREDERICK L. SIMMONS,
Attorneys for Petitioner.

APPENDIX.

EXHIBIT A.

Opinion.

Decision No. 59828.

Before the Public Utilities Commission of the State of California.

In the Matter of the Application of Dyke Water Company, a corporation, for authorization to increase its rates charged for water service. Application No. 39303 Amended.

Investigation of the Commission's own motion into the rates, rules, regulations, contracts, operations and practices pertaining to and involving water main extensions of Dyke Water Company, a public utility water corporation. Case No. 5841.

The above-entitled application of Dyke Water Company, a corporation, was filed August 6, 1957, and amended on October 8, 1957. The applicant sought and seeks authority to increase its rates for general flat rate service from a basic amount of $3 per service connection per month to $4.50, a 50 per cent increase, and to increase its general metered service rates from $2.50 per meter per month for the first 1,000 cubic feet or less to $3.75, with corresponding increases in the unit quantity rates, also representing an increase of 50 per cent. The estimated increase in gross annual revenues at the proposed rates is approximately $375,000.

A public hearing on the First Amendment to the application was held before Commissioner Rex Hardy and Examiner Stewart C. Warner on November 1, 1957, at Santa Ana. The purpose of said hearing was to establish a record as to whether or not the applicant should receive interim rate relief. Based upon such rec-

ord, an interim opinion and order (Decision No. 56003, dated December 17, 1957) authorized the applicant to increase its monthly residential flat rate from $3 to $3.75, with corresponding increases in the rates and charges in the general metered service schedule. Said interim decision found the existence of exigent circumstances, primarily a financial emergency, which justified the authorized increases in rates and charges.

By an order dated October 30, 1956, the above-entitled investigation was instituted.

Public hearings on both of the above matters were held on a consolidated record before Commissioner Hardy and Examiner Warner on December 26, 1957; before Commissioner Matthew J. Dooley and Examiner Warner on January 14, and 15, 1959, and before Examiner Warner on March 18, April 17, 20, 21, 22, 23, 24, 27, 28 and 30, and May 1, 1959, at Santa Ana, and May 5, 6, 7 and 8, 1959 in Los Angeles. Orange County Water District appeared as an interested party to urge that applicant be required to install meters on all customers' premises for water conservation purposes; Pacific Water Co. appeared as an interested party and as a protestant insofar as the proposed increase in rates for water service might affect certain areas where applicant was furnishing water service outside its certificated area and within the certificated area of Pacific; one customer of the applicant appeared to report the results of a survey made of applicant's customers in Midway City regarding their views on flat rate service versus general metered service; 9 letters from customers were received and read into the record by the presiding officer at hearings when so received; and an exhibit was introduced by the applicant as an affidavit that 18,500

post cards had been mailed by the applicant on March 23 and 24, 1959, to its customers seeking their views on the questions of (1) whether they wanted meters installed at their houses, and (2) whether they would pay 75 cents more a month "to put your water company on a paying basis and sound financial position to preserve the low flat rate basis of water distribution which has been so successful here?"

On May 5, 1959, the applicant filed a Petition for Proposed Report pursuant to Rule 69 of the Commission's Rules of Procedure; on May 8, 1959, applicant's counsel moved for a supplemental hearing to determine how the Commission arrives at its decisions; on May 12, 1959, the Commission granted said petition and directed the presiding Examiner to prepare and file a proposed report, denied said motion for a supplemental hearing on grounds that it was improper, and concluded that, having granted the petition, oral argument before the Commission en banc would be unnecessary and canceled such argument set for May 19, 1959.

The proposed report was prepared and filed in accordance with such directions, pursuant to the Commissions Rule 70, on May 28, 1959. Exceptions thereto were filed, pursuant to Rule 71, by the applicant, by Pacific Water Co., and by the Commission staff, on June 19, 1959; by Orange County Water District on June 22, 1959; and by the City of Garden Grove on June 24, 1959. Replies to said exceptions were filed by Orange County Water District on June 30, 1959, and by the applicant on July 6, 1959. The matters stand submitted and are ready for decision.

No material exception to evidentiary facts outlined in the proposed report was taken by any party, and

such facts and review of the evidence in the proceeding need not be repeated herein. The Commission hereby finds that those sections of the proposed report dealing with factual and evidentiary matters constitute true statements of the evidence and of the facts and as such they are hereby adopted by the Commission.[1]

Table 14-A of Exhibit No. 19 includes a Summary of Earnings for the years 1957, 1958 Estimated, and 1959 Estimated at prior interim and proposed rates at present operations, as follows:

Account	Year 1957 Recorded	Year 1958 Estimated	Year 1959 Estimated Present Operations		
			Prior Rates	Interim Rates	Proposed Rates
	(Using Straight-Line Income Tax Depreciation)				
Operating Revenues	$657,025	$825,000	$ 751,000	$ 938,700	$1,126,200
Operating Expenses					
Oper. & Maintenance	219,575	232,900	249,800	249,800	249,800
Adm. & Gen., Misc. Exp.	135,020	70,000	72,200	72,200	72,200
Taxes other than Income	120,102	36,500	39,800	39,800	39,800
Depreciation	122,507	97,200	102,500	102,500	102,500
Taxes on Income	13,220	193,000	106,100	207,300	308,400
Total Expenses	610,424	629,600	570,400	671,600	772,700
Net Revenue	46,601	245,400	180,600	267,100	353,500
Depr. Rate Base	.....	929,000	1,123,000	1,123,000	1,123,000
Rate of Return	.....	26.42%	16.08%	23.78%	31.48%

The record shows that since 1954 the applicant has computed and paid income taxes using accelerated income tax depreciation as a deductible expense, and no testimony was adduced by the applicant that it intended to claim income tax depreciation on any other basis for the year 1959 or for any future period.

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[1] The sections to which reference is here made are headed *General Information; Accounting Procedures; Earnings; Financial Condition; Meters; Main Extension Practices; Metropolitan Water District Water; Staff Recommendations;* and *Pacific Water Co. Evidence.*

The question of what rate treatment should be given to reduce federal income tax payments resulting from the use of accelerated depreciation as permitted by Section 167 of the Internal Revenue Code, is under consideration by the Commission, and pending determination of the problem by the Commission we have considered straight-line depreciation for income tax purposes in this matter. When decision is made by the Commission as to the use of accelerated depreciation, then such necessary adjustments, if any, will be made by the Commission in respect to income tax payments made by the utility.

Based upon the entire record and being fully cognizant of the views of the various parties, the Commission makes the following findings and conclusions. In viewing such findings and conclusions it should be kept clearly in mind that the basic matters of concern in these proceedings are two: namely, applicant's request for increased revenues and the Commission's investigation of applicant's main extension practices. All other issues, although of some importance, are ancillary.

In the basic matter of revenues, the Commission finds that the revenues produced by the rates authorized in the interim order herein (Decision No. 50003) have fully met the needs of the financial emergency then existing and foreseen. The Commission finds as a fact that there is not presently such an emergency situation as would necessitate or otherwise justify a continuance of the increased rates and charges authorized by such interim order. It is fair and reasonable and in the public interest, therefore, to terminate the rates and charges authorized on the interim basis.

One ancillary issue directly affecting revenues and the earning position of applicant is that concerning the needs for metering of service connections. The evidence on this subject is substantial and convincing that the public interest requires that applicant's system be fully metered at the earliest practicable date. The record indicates, from the testimony of applicant's president, that the financing of a metering program would be feasible.[2] It appears reasonable, therefore, to require that applicant immediately undertake the installation of meters on existing service connections at a rate of no fewer than 400 meters each month until all have been metered. All new service connections, of course, shall be metered as they are placed in service.

The Commission finds that applicant's estimates of revenues, expenses and rate base for the year 1959 are unrealistic, unreliable and unreasonable. The estimates of the Commission staff,[3] however, are found to be fair and reasonable and are hereby adopted for the rate-making purposes of the proceeding. Such will be used in testing the reasonableness of applicant's earning position at the rates and charges in effect prior to the interim order herein. After making appropriate modifications to the staff-derived figures so as to recognize reasonable increased revenues, greater expenses and a higher rate base for a properly metered system and giving due cognizance of the trend of rate of return as occasioned by the refunding of advances for construction during the year 1960 and subsequent years, the Commission concludes that applicant would earn a rate of return of somewhat more than 7 per cent on a de-

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[2]Testimony of Dyke Lansdale, TR 1974-1977.

[3]As contained in Exhibit No. 19.

preciated rate base of approximately $2,269,000." The Commission finds such a rate of return on such a rate base to be within the zone of reasonableness and concludes, therefore, that the pre-interim rates and charges for water service will, during the foreseeable future, enable applicant to fully meter its system; provide sufficient and properly qualified personnel function efficiently, conform to all the requirements of law and to earn a fair and reasonable return on its investment in plant devoted to public utility water service. The pre-interim rates will be reinstated.

In the basic matter of main-extension practices, the Commission finds that applicant has extended its water system into territory into which it had no right to extend, and pursuant to agreements which are unlawful.[4] Such extensions have been imprudent and the resulting involvement in making repayment of large sums of money out of revenues to defray the cost of capital additions to applicant's plant, both within and without applicant's certificated area, made by persons as advances for construction, clearly constitutes unlawful conduct; reveals a failure to recognize the minimum responsibility incumbent on the part of applicant's management; and indicates a failure to apply prudent management principles in the conduct of applicant's public-utility water business. Further, it appears that applicant may have contracted for long-term debt[5] without having obtained this Commission's authority therefor as required by law. The Commission would be derelict in its duty of protecting the public interest if it were to countenance any continuation of these unlawful and

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[4]See Exhibit No. 44.

[5]In the sum of $376,078 as shown in Exhibit No. 57.

imprudent practices or permit the burdening of utility customers with added costs attributable to such improper practices. The Commission concludes that applicant must immediately cease and desist from any extension practice which does not comply strictly with the lawfully effective Rule No. 15 concerning main extensions.

The Commission finds as a fact that the public interest and standard accounting practices require that applicant should be directed to adjust its books of account to conform to the balance sheet as of December 31, 1957, after adjustments, as shown on Table 4-B of Exhibit No. 19; that applicant should be directed to continue to carry out and place into effect the staff recommendations contained in Chapter 16 of Exhibit No. 19; and that applicant should be directed to immediately dispose of its recorded contributions pursuant to the classification and itemization in Appendix C of Exhibit No. 44 in accordance with the staff recommendations contained in Chapter 4 of said exhibit.

The Commission finds as fact that the rates and charges for water service hereinafter ordered to be reinstated are for the future fair and reasonable rates and are justified by the record in this proceeding. Further, it is found as a fact that in so far as existing rates and charges differ from those hereinafter prescribed, such existing rates and charges are for the future unjust and unreasonable.

Order

Application as above entitled, as amended, having been filed, and an investigation on the Commission's own motion into the rates, rules, regulations, contracts, operations and practices pertaining to and involving water main extensions of Dyke Water Company, a corporation, having been instituted, public hearings having been held, an Examiner's Proposed Report and Exceptions and Replies to said Report having been filed and having been fully considered, and based on the record and the findings of fact and conclusions hereinbefore set forth,

It Is Hereby Ordered as follows:

1. The rates and charges established by Decision No. 50003, issued December 17, 1957, and set forth therein as Appendix A, are hereby terminated as of the seventh day following the effective date of this order.

2. Coincidental with the termination of said rates and charges there are hereby reinstated, as the regularly filed and effective rates and charges of the Dyke Water Company, tariff "Schedule No. 1, General Metered Service, Cal. P.U.C. Sheet No. 69-W" and tariff "Schedule No. 2, General Flat Rate Service, Cal. P.U.C. Sheets Nos. 116-W and 117-W."

3. Dyke Water Company is hereby directed to adjust its books of account to conform to the balance sheet as of December 31, 1957, after adjustments, as shown on Table 4-B of Exhibit No. 19 in this proceeding.

4.a. Dyke Water Company shall install meters on all new service connections installed on and after the effective date of this order; and

b. Dyke Water Company shall immediately institute a metering program and shall install, so as to permanently convert from flat rate to metered service, not less than 400 meters per month, in addition to metering all new service connections, until all residential and other general service connections shall have been metered; and

c. Shall, within ninety days after the effective date of this order and every one hundred eighty days thereafter, report to this Commission in writing the total number of meters installed, together with the net number of meters installed during the period covered in each such report, until all of its service connections have been metered.

5. Dyke Water Company is directed to continue to carry out and place into effect the staff recommendations contained in Chapter 10 of Exhibit No. 19.

6.a. Dyke Water Company is directed to immediately dispose of its recorded contributions pursuant to the classification and itemization in Appendix C of Exhibit No. 44 in accordance with the staff recommendations contained in Chapter 4 of said exhibit; and

b. Within ninety days after the effective date of the order herein, certify to the Commission in writing, over the signature of a responsible officer, that it has complied herewith.

7. Hyke Water Company shall immediately cease and desist from entering into any contract for an extension of its water system or any part thereof, except such as shall strictly comply with its Rule No. 15 or upon specific order of this Commission.

8. Case No. 5841 is discontinued.

9. The effective date of this order shall be April 11, 1960.

Dated at San Francisco, California, this 22nd day of March, 1960.

EVERETT C. McKEAGE,
President.
PETER E. MITCHELL,
MATTHEW J. DOOLEY,
C. LYN FOX,
THEODORE H. JENNER,
Commissioners.

Certified as a True Copy.

NOEL COLEMAN,
Assistant Secretary, Public Utilities Commission,
State of California.

EXHIBIT B.

Applicant's Petition for Rehearing Before Commission.

Decision No. 59828.

Before the Public Utilities Commission of the State of California.

In the Matter of the Application of Dyke Water Company, a corporation, for authorization to increase its rates charged for water service. Application No. 39303.

Investigation on the Commission's own motion into the rates, rules, regulations, contracts, operations and practices pertaining to and involving water main extensions of Dyke Water Company, a public utility water corporation. Case No. 5841.

To the Public Utilities Commission of the State of California:

Comes Now, Dyke Water Company, a corporation, Applicant in Application No. 39303 and a party in Case No. 5841, and petitions that the opinion and order of the Commission in the above-entitled matter, dated the 22nd day of March, 1960, effective April 11, 1960, be set aside, and vacated, and that an order granting a re-hearing of all issues of fact and law involved in said case, be made.

In support of this Petition, Applicant respectfully represents that said opinion and order of the Commission is erroneous and unlawful for the following reasons:

I.

The opinion and order dated March 22, 1960, is based upon evidence, all presented prior to May 8,

1959, and therefore fails to take cognizance of and is made without reference to events and facts occurring subsequent to the last date on which evidence was presented, and subsequent to the filing of the proposed report of Examiner Stewart C. Warner on May 28, 1959.

Applicant represents that subsequent to May 28, 1959, Applicant's operating revenues and expenses materially differ from the estimates presented in Table 14-A of Exhibit 19 reproduced in the opinion and order. Applicant represents that Applicant's expenses of operating and maintenance, administration, and taxes have materially increased since May 28, 1959, as indicated by the declarations of Applicant's president, attached hereto as Exhibit A and made a part hereof as if fully set out herein. Applicant further represents that on re-hearing of the case, it is prepared to, and will, introduce substantial evidence, both oral and documentary, in support of the allegations herein.

II.

The opinion and order constitutes a violation of the Federal and California State Constitutional guarantees against the taking of privately owned property without compensation in that the rates ordered therein constitute a confiscation of Applicant's property, and in that the rates ordered therein do not allow a fair return on the property of Applicant as required by law on the basis of evidence heretofore submitted, and on the basis of substantive evidence which Applicant represents, it is prepared to and will submit on re-hearing of the case.

III.

The opinion and order is erroneous and constitutes an arbitrary and capricious action by the Commission, in that the opinion expressly adopts and finds that the ". . . sections of the proposed report dealing with factual and evidentiary matters constitute true statements of the evidence and of the facts," but the order therein is completely inconsistent with, and directly contrary to, the recommended order of the proposed report, which rested on the evidentiary matter adopted by the opinion and order.

In purporting to adopt the evidentiary matter of the proposed report but rejecting the recommended order of that proposed report, filed pursuant to the Commission's own rules, without notice, hearing, or the taking of additional evidence, the opinion and order constitutes a violation of Federal and California State Constitutional guarantees of due process of law. The constitutional requirements of fairness extend to all parts of the administrative procedure. The patent inconsistency of adopting the proposed report as the evidentiary base, but rejecting in toto the substance of the recommended order of the proposed report almost ten months after the proposed report was filed constitutes a denial of the right to a fair hearing to Applicant.

IV.

The opinion and order is unreasonable and impossible of performance by Petitioner, particularly with reference to, and to the extent that the order direct Applicant to "immediately institute a metering program of not less than four hundred (400) meters per month, in addition to metering all new service connections, un-

til all residential and other general service connections have been metered." Applicant represents that, in light of Applicant's present financial ability, and the cost of materials, equipment and labor necessary for compliance therewith, the opinion and order is unreasonable and impossible of performance by Petitioner. Applicant represents that on re-hearing of the case, it is prepared to, and will introduce substantial evidence, both oral and documentary, in support of the allegations herein, as indicated by the declarations of Applicant's president, attached hereto as Exhibit B and made a part hereof as if fully set out herein.

The opinion states: "The record indicates, from the testimony of Applicant's president, that the financing of a metering program would be feasible." (TR 1947-1977). The record does not indicate that the installation of four hundred (400) a month is economically feasible without increased revenues; to the contrary, the record indicates (TR 1974, lines 5-10, inclusive) that metering could be financed "out of the increased revenues" that are denied by the order and the opinion.

V.

The order and opinion is without the jurisdiction of the Commission to the extent that it directs and orders the installation of "meters on all new service connections" and "shall install, so as to permanently convert from flat rate to metered service, not less than four hundred (400) meters per month, in addition to metering all new service connection, until all residential and other general service connections shall have been metered. . . ."

VI.

The opinion and order is uncertain and unclear in that it is impossible to ascertain therefrom the effect of present and anticipated federal income taxation on Applicant's revenues. The opinion and order states that "the question of what rate treatment should be given to reduce federal income tax payments, resulting from the use of accelerated depreciation as permitted by Section 167 of the Internal Revenue Code, is under consideration by the Commission, and pending determination of the problem by the Commission we have considered straight-line depreciation for income tax purposes in this matter. When decision is made by the Commission as to the use of accelerated depreciation, then such necessary adjustments, if any, will be made by the Commission in respect to income tax payments made by the Utility." In view of these statements, Applicant is unable to ascertain the present and anticipated consequences of the opinion and order with respect to the payment of and allocation for anticipated income tax obligations.

VII.

The opinion and order is against the weight of the evidence, and with respect to Applicant, is against all the evidence disclosed by the record.

VIII.

The opinion and order purports to be based on evidence reflecting conditions existing prior to May 8, 1959, and estimates of future conditions drawn from data available prior to that time. Thus, the opinion and order is not based on the best evidence. For example, Exhibit 19, which the opinion and order par-

tially reproduces, consists, in major part, of estimates of the Applicant's operating revenues and operating expenses for 1958 and 1959. Applicant represents that its actual operating revenues and expenses are now available, and will be made available and introduced, as the best evidence, on re-hearing of the matter, and that the actual revenues and operating expenses materially differ from the estimates of Exhibit 19, all to the Applicant's substantial prejudice.

IX.

On May 12, 1959, the Commission denied Applicant's May 8, 1959, motion for a supplemental hearing to determine how the Commission arrives at its decisions on the ground that it was improper. The denial of such motion denied to Applicant the opportunity to establish whether the application and the case would be resolved by and with reference to the record of the proceedings and not by unfounded and unsubstantiated allegations outside the record.

At the time that above-described motion was denied, the Commission granted Applicant's petition for a proposed report, and Applicant participated in the proceedings by which the proposed report was prepared.

In view of the rejection by the Commission of the proposed report, Applicant contends that the denial of the motion for a supplemental hearing constituted an abuse of discretion by the Commission and a denial of the requirements of fair hearing and due process of law accorded to this Applicant, and any Applicant, before this Commission.

Thus the opinion states: "After making appropriate modifications to the staff-derived figures so as to

recognize reasonable increased revenues, greater expenses and a higher rate base for a properly metered system and giving due cognizance of the trend of rate of return as occasioned by the refunding of advances for construction during the year 1960 and subsequent years, the Commission concludes that applicant would earn a rate of return of somewhat more than 7 per cent on a depreciated rate base of approximately $2,269,000."

It is apparent from the quoted statement that evidence outside the record was considered by the Commission, and on consideration of such extraneous matters, the recommended order of the proposed report was rejected.

Wherefore, Appellant respectfully prays that the decision and order of the Commission, dated the 22nd day of March, 1960, in the above-entitled matter, be set aside and vacated;

That Applicant be granted a rehearing of all issues of fact and law herein;

That at such re-hearing, Applicant be permitted to introduce new and additional evidence;

That said application and case be submitted only upon and after oral and written argument before the Commission, after the introduction of such evidence;

That Applicant be granted an opportunity to submit written argument in the nature of briefs on the facts and law of the issues herein raised; and

That thereafter, upon the submission of said cause, the Commission issue its decision and order granting the prayer of Applicant's original application, and for

such order or orders as to the Commission seem just and meet in the premises.

Respectfully submitted,

DYKE WATER COMPANY,
By FREDERICK L. SIMMONS
RICHARD P. ROE,

For H. O. VAN PETTEN,
FREDERICK L. SIMMONS,
Attorneys for Applicant.

EXHIBIT A.

State of California County of Los Angeles, ss.

Dyke Lansdale, being first duly sworn, deposes and says:

That he is the President of the Dyke Water Company, a corporation;

That pursuant to Application No. 39303 (Amended) being a request by the Dyke Water Company to increase its rates for water service pursuant to Section 454 of the Public Utilities Code of the State of California, to enable it to meet the rising costs and expenses in furnishing water service to its approximately 23,000 customers, and to enable it to continue rendering the best possible service, affiant states:

That, the schedules of applicant heretofore admitted into evidence no longer reflect the Company's financial position, due to changed conditions;

That, subsequent to May 28th, 1959, the following costs and expenses have increased substantially and materially in the following particulars:

Taxes, both real and personal:

Orange County Water District's Water Replenishment Tax,

Materials and equipment;

Salaries;

Gas;

Labor;

Governmental fees (permits, zone variance fees; licenses, etc.);

Re-locating mains and installations for County, State and Road Improvements;

DYKE LANSDALE

Dyke Lansdale

Subscribed and sworn to before me this 30th day of March, 1960.

Beth Donald

Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT B.

State of California, County of Los Angeles—ss.

Dyke Lansdale, being first duly sworn, deposes and says:

That he is the President of the Dyke Water Company, a corporation, and that he is familiar with the operating costs and expenses necessary and essential to the furnishing of domestic and irrigating water to over 23,000 users in Orange County; and that he is also familiar with the amount of revenues received from the operation and maintenance of the Dyke Water Company at its interim rate of $3.75 flat rate service.

That the opinion and order requiring the installation of 400 meters per month on all existing connections, and all new connections, would impose an impossible financial burden of Dyke Water Company and seriously jeopardize adequate service to existing and anticipated future users by burdening the Dyke Water Company with financial obligations far beyond the dictates of sound business management.

That, there are but an average of twenty working days per month, and to install the required minimum of 400 meters per month would necessitate the installation of a minimum of twenty meters each working day.

That the installation of a single meter in a residential connection requires a crew of two men with one truck with machinery and tools thereon. Generally, one crew can install three meters a day. Thus, compliance with the metering order would require the full-time employment of approximately seven crews and one foreman, exclusively for the metering program, and the acquisition of additional capital equipment consisting of at least seven trucks, tools, machinery, new billing facilities, machinery and personnel, and administrative facilities, including building and personnel.

That the intial expenditures by the company necessary to comply with the opinion and order with respect to metering would exceed by far the revenues presently available to the company or reasonably to be anticipated and that credit acquisitions on terms reasonably to be anticipated would place the Dyke Water Company in danger of serious financial adversity.

Moreover, the rate decrease ordered in the opinion and report would immediately decrease revenues and make

ordinary credit acquisition of the necessary facilities virtually impossible.

That when apprised of the terms of the opinion and order, Affiant proceeded to fully investigate the necessary expenditures to comply therewith, and has obtained estimates of the cost thereof, and affiant is prepared to testify, in detail as to the exact expenditures which would be required and as to the modes by which such expenditures could be financed.

DYKE LANSDALE
Dyke Lansdale

Subscribed and sworn to before me this 30th day of March, 1960.

Beth Donald
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT C.

Order Denying Rehearing.

Decision No. 60055.

Before the Public Utilities Commission of the State of California.

In the Matter of the Application of Dyke Water Company, a corporation, for authorization to increase its rates charged for water service. Application No. 39303 Amended.

Investigation on the Commission's own motion into the rates, rules, regulations, contracts, operations and practices pertaining to and involving water main extensions of Dyke Water Company, a public utility water corporation. Case No. 5841.

Dyke Water Company, a corporation, having filed a petition for rehearing of Decision No. 59828, and the Commission having considered said petition and each and every allegation therein, and being of the opinion that no good cause for granting a rehearing has been made to appear:

It Is Ordered that the petition for rehearing be, and the same is, hereby denied.

Dated at San Francisco, California, this 9th day of May, 1960.

EVERETT C. McKEAGE
President

PETER E. MITCHELL,
MATTHEW J. DOOLEY,
C. LYN FOX
THEODORE H. JENNER
Commissioners.

EXHIBIT D.

Petition for Writ of Certiorari or Review.

In the Supreme Court of the State of California.

Dyke Water Co., a corporation, Petitioner, vs. Public Utilities Commission of the State of California, and Everett C. McKeage, Peter E. Mitchell, Matthew J. Dooley, C. Lyn Fox, and Theodore H. Jenner, Respondents.

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Dyke Water Company, Petitioner herein, applies for the issuance of a Writ of Certiorari or Review to the Respondents, pursuant to the provisions of Sections 1756, 1757, 1758, 1759 and 1760, of the Public Utilities Code of the State of California, and in support thereof respectfully shows as follows:

I.

At all times mentioned herein the Respondent, Public Utilities Commission of the State of California, was and it now is a Commission duly organized and existing under and by virtue of the Constitution and laws of the State of California, and the Respondents, Everett C. McKeage, Peter E. Mitchell, Matthew J. Dooley, C. Lyn Fox, and Theodore H. Jenner, now are the duly appointed, qualified and acting members of the said Commission.

II.

Petitioner, Dyke Water Company, a California corporation, was at all times herein mentioned Applicant

in Application No. 39303, and a party in Case No. 5831, before the above-described Public Utilities Commission. At all times mentioned herein, Petitioner, Dyke Water Company, has been and now is conducting a public utility water business in the County of Orange, State of California.

III.

On August 6, 1957, Dyke Water Company, Petitioner herein, filed an Application for Authorization to increase its rates charged for water service and amended such Application on October 8, 1957. By the above-described Application, the Applicant sought and seeks authority to increase its rates for general flat rate service from a basic amount of Three Dollars ($3.00) per service connection per month to Four Dollars and Fifty Cents ($4.50), and to increase its general metered service rates from Two Dollars and Fifty Cents ($2.50) per meter per month for the first one thousand (1,000) cubic feet or less to Three Dollars and Seventy-five Cents ($3.75), with corresponding increases in the unit quantity rates.

IV.

A public hearing on the amended Application above described was held on November 1, 1957, at Santa Ana, California. Upon the record of such proceedings, and by Decision No. 56003, dated December 17, 1957, the Respondent, Public Utilities Commission, made an interim order authorizing Applicant to increase its monthly residential flat rate from Three Dollars ($3.00) to Three Dollars and Seventy-Five Cents ($3.75), with corresponding increases in the rates and charges in Applicant's general metered service schedule, pending final determination of the Application.

V.

Public hearings on the Application for Authorization to increase rates, and upon Case No. 5841, an investigation on the Commission's own motion into the rates, rules, regulations, contracts, operations and practices pertaining to and involving water main extensions of Dyke Water Company, were held on a consolidated record at various times from December 26, 1957, through May 8, 1959.

VI.

On May 5, 1959, the Petitioner, Dyke Water Company, filed a Petition for proposed report pursuant to Rule 69 of the Commission's rule of procedure.

VII.

On May 8, 1959, Petitioner moved for a supplemental hearing to determine whether the Commission would consider material outside the record in the making of its decision.

VIII.

On May 12, 1959, the Commission denied Petitioner, Dyke Water Company's, May 8, 1959, motion and granted Dyke Water Company's Petition for a proposed report, pursuant to Rule 69.

IX.

On May 28, 1959, the proposed report of Examiner, Stuart C. Warner, was filed, a copy of which is attached hereto as Exhibit One and incorporated herein by reference.

X.

No action was taken by the Respondent, Public Utilities Commission, with respect to the proposed report for nine months and twenty-six days, until an opinion

and order, Decision No. 59828, dated the 22nd day of March, 1960, with an effective date of April 11, 1960, was filed by the Respondent Commission, a copy of which is attached hereto as Exhibit Two and incorporated herein by reference.

XI.

On March 31, 1960, Petitioner filed a Petition for Rehearing Before Commission, a copy of which is attached hereto as Exhibit Three and incorporated herein by reference.

XII.

On May 9, 1960, Respondent Commission denied Dyke Water Company's Petition for Rehearing Before Commission without opinion by an order dated May 9, 1960, a copy of which is attached hereto as Exhibit Four and incorporated herein by reference.

XIII.

As indicated in Applicant's Petition for Rehearing (Exhibit Three), in rendering Decision No. 59828 and in denying the Petition for Rehearing thereof, the Respondent Commission, exercising a judicial function, acted without authority of law, and without jurisdiction in that:

1. The opinion and order denied to Petitioner the opportunity to present evidence as to increased operating revenues and expenses, materially differing, to Petitioner's substantial prejudice from the estimates of revenues and expenses for 1958 and 1959 on which the opinion and order relating to rates purports to be based.

2. The opinion and order constitutes a confiscation of Petitioner's property and fails to provide a fair return to Petitioner's investment as required by law.

3. The action of the Commission, in refusing Petitioner an opportunity to present additional relevant and material evidence, on rehearing of the matter, as to operating revenues and expenses subsequent to May 28, 1959, the last date on which evidence was presented, denied to Petitioner procedural due process of law and an opportunity for a fair hearing as required by law with respect to the question of rates and the duty of metering.

4. The decision is arbitrary and capricious in that it imposes an unreasonable and impossible burden on Applicant with respect to metering of existing and future connections.

5. The order and opinion with respect to metering is without and beyond the jurisdiction of the Commission.

6. The opinion and order is inconsistent, uncertain and unclear in that it purports to reserve the question of what depreciation figures are to be used for purposes of establishing the rate base, but decides the question by utilizing straight line depreciation.

7. The opinion and order is against the weight of the evidence, and with respect to Petitioner, is wholly unsupported by the evidence disclosed by the record.

8. The opinion and order purports to be based on evidence consisting of estimates of Petitioner's financial condition in years past, all the true facts of which are now available for presentation to the Commission and which Petitioner proposed to offer on rehearing of this matter.

9. Petitioner was denied procedural due process and a fair hearing as required by law in the Commission's refusal to indicate the manner in which the Commis-

sion arrives at its decisions, and that the Commission has reached a decision, as reflected in Decision No. 59828, in the Order dated March 22, 1960, effective April 11, 1960, which is unsupported by the evidence in the record of the proceedings before the Respondent Commission and is based on material outside the record.

XIV.

By Decision No. 59828, in an opinion and order dated March 22, 1960, effective April 11, 1960, Petitioner is ordered to terminate its interim rates of Three Dollars and Seventy-Five Cents ($3.75) and revert back to its general flat rate of Three Dollars ($3.00) per service connection per month in effect prior to August 6, 1957.

Petitioner is also ordered to install meters on all new service connections installed on or after the effective date of the order, and shall "immediately institute a metering program and shall install, so as to permanently convert from flat rate to metering service, not less than four hundred (400) meters per month, in addition to metering all new service connections, until all residential and other general service connections shall have been metered."

XV.

Petitioner is informed and believes that the Respondent Commission intends to enforce by contempt proceedings, or by criminal prosecution, or by both, said opinion and order in Application No. 39303 and Case No. 5841 as reflected in Decision No. 59828.

Petitioner is informed and believes that, unless said opinion and order is annulled on Writ of Certiorari or Review or by Writ of Prohibition granted to arrest

the proceedings of said Commission, then proceedings which are in excess of jurisdiction of said Commission, for the enforcement of said order, will be instituted and prosecuted by Respondent Commission.

XVI.

No appeal lies from said order and opinion, and Petitioner has no other plain, speedy or adequate remedy for the said unlawful action of the Respondent Commission in the premises, except the granting of a Writ of Certiorari or Review or of Prohibition by this honorable court. Petitioner respectfully represents that it is just and proper, and necessary to protect the interest of Petitioner, Dyke Water Company, herein, that a Writ of Certiorari or Review issue out of this court, requiring the said Respondent Commission to certify to this Court Decision No. 59828, in the opinion and order dated March 22, 1960, in Application No. 39303 and Case No. 5841, together with the entire record in said cause, including a transcript of all testimony and all Exhibits or copies thereof introduced, and of the pleadings, all files, filings, correspondence and other records and proceedings in the said cause, or in any manner relating thereto, and that this court thereupon review the said opinion and order and decision of the said Respondent Commission, and vacate, annul and set aside the said decision, opinion and order, or that a Writ of Prohibition issue to arrest the proceedings of said Commission on said void order.

XVII.

Petitioner further represents that unless the said decision, opinion and order of the Respondent Commission in said cause be reviewed and annulled, or unless a Writ of Prohibition be issued as aforesaid, Peti-

tioner will be deprived of its property as described above, and will sustain great material and irreparable damage as aforesaid.

Wherefore, Petitioner, Dyke Water Company, prays:

1. That a Writ of Certiorari or Review issue from this court, addressed to the Respondent, Public Utilities Commission, of the State of California, and Respondents, Everett C. McKeage, Peter E. Mitchell, Matthew J. Dooley, C. Lyn Fox and Theodore H. Jenner, commanding and requiring the said Commission and members thereof to certify to this court, at a specified time and place, all of the said records and proceedings of the said Commission in Case No. 5841, Application No. 39303, including the order and opinion, Decision No. 59828, dated March 22, 1960, with an effective date of April 11, 1960, the transcript of all testimony, together with all the Exhibits or copies thereof, introduced, and the pleadings, all files, filings, correspondence, records, and proceedings of said cause, including all "confidential" communications and memoranda by, between and among the individual members of Respondent Commission and members of the Commission's staff, and that the said proceedings herein referred to be reviewed by this court in order that the lawfulness of the said acts of the said Commission in making the said findings and the said opinion and order and decision, and in making the said order denying the Petition for Rehearing above described, may be inquired into and determined by this court; and

2. That this Petition, and all of said records and proceedings, including "confidential" communications and memoranda, be fully inquired into and considered by this court, and that thereupon it be ordered, adjudged

and decreed by this court that said order made by said Respondent, Public Utilities Commission, be annulled, vacated and set aside, and that Petitioner recover the costs of suit herein incurred; and have such other, further or different relief by way of Writ of Prohibition, or otherwise, as to this court may seem meet in the premises.

Respectfully submitted,

/s/ FREDERICK L. SIMMONS,
RICHARD P. ROE,
H. O. VAN PETTEN,
FREDERICK L. SIMMONS,
For Dyke Water Company, Petitioner.

Dyke Lansdale, being first duly sworn, deposes and says:

That he is the President of Petitioner herein, and has authority to make this verification for and on behalf of said corporation; that he has read the foregoing Petition for Writ of Certiorari or Review and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

/s/ DYKE LANSDALE
Dyke Lansdale

Subscribed and sworn to before me this 18th day of May, 1960.

Beth Donald,
Notary Public in and for Said County and State.

EXHIBIT E.

Memorandum of Points and Authorities in Support of Petition for Writ of Certiorari or Review.

I.

Introductory Statement.

Petitioner submits that the orders of Respondents, culminating in Decision No. 59828, dated March 22, 1960, and Decision No. 60055, dated May 9, 1960, denying without opinion Petitioner's petition for rehearing constitute an arbitrary and capricious abuse of the Respondent Commission's discretionary powers. The following summary of the events clearly shows the prejudice of Respondents toward Petitioner, and the Respondent Commission's unwillingness and refusal to limit the exercise of its admittedly broad powers within the range of reasonableness required by law.

In August 1957, Petitioner made application to the Respondent Commission for authority to increase its rates which had been in effect since 1952.

On December 17, 1957, on the basis of an express finding of a financial emergency facing the Petitioner, an interim order was made by the Commission authorizing temporary rate increase from the then $3.00 monthly residential flat rate to $3.75 and corresponding temporary increases in Petitioner's rates for metered connections.

Thereafter, numerous and comprehensive public hearings were held with respect to the application and the companion case (investigation as to various practices of Petitioner) until May 8, 1959. At the conclusion of the hearings, Petitioner moved for a supplementary hearing to determine whether the Commission would

consider material outside the record in arriving at its decision. The motion was denied. But as a stated substitute and in response to another motion by Petitioner, Examiner Stewart C. Warner, the hearing officer, was directed by the Commission to file a proposed report. Examiner Warner filed the proposed report on May 28, 1959. This proposed report, including the Examiner's recommended order, is attached to the Petition as Exhibit One. In substance, the recommended order of the Examiner provided that:

(1) The interim increase of December 17, 1957 from $3.00 to $3.75 for residential flat rates be made permanent; and

(2) That Petitioner commence installation of meters on existing connections out of monies to be provided for that purpose by a 75¢ monthly surcharge, for each residential user to be in effect until the meter program was completed.

Although exceptions were filed to the proposed report by the interested parties, including Petitioner, it was evident that the parties considered the recommended order of the proposed report as a not unreasonable resolution of the matter.

Thereafter, no action was taken by the Commission as to the application and companion case for nine months and twenty-six days, until March 22, 1960. Then it rendered Decision No. 59828 attached to the petition as Exhibit Two.

Although the decision purports to adopt the findings of the proposed report with respect to "factual and evidentiary matters" (found to be "true statements of the evidence and of the facts"), the Commission's order is

diametrically opposed to the proposed report's recommended order.

The Commission's March 22, 1960 order requires Petitioner:

(1) To *reduce* its rates to those in effect in 1952; and

(2) To immediately institute a program of installing in *excess* of 400 meters per month *without* the benefit of any rate increase or funding of monies from any special surcharge.

On receipt of the decision, Petitioner immediately filed with the Commission a petition for rehearing, attached to the petition as Exhibit Three. The petition for rehearing, supported by affidavits, sought an opportunity to present to the Commission the then available evidence relevant to the application and companion case and Petitioner's ability to comply with the order.

The petition for rehearing was denied, without opinion, by the Commission's order of May 9, 1960. That order denied Petitioner an opportunity to present highly relevant and material evidence of the Petitioner's *actual* operating expenses and revenues for 1958 and 1959, which evidence was unavailable at any time during the hearings. That order also denied Petitioner an opportunity to present evidence of the substantial increase in Petitioner's costs of operations that had taken place since the proposed report was filed, as well as the substantial expenditures which would be required to comply with the order. This evidence bears on Petitioner's rates and ability to comply with the metering order.

II.

Petitioner's Remedy Is by Writ of Certiorari or Review to the Supreme Court.

An application for rehearing by the Commission is a condition precedent to judicial relief from an order or decision of the Public Utilities Commission. (*Albin v. Railroad Commission*, 216 Cal. 655, 657 (1932); *Carlson v. Railroad Commission*, 216 Cal. 653, 655 (1932).)

A petition for a writ of certiorari or review may be filed within 30 days after the application for rehearing is denied. (Public Utilities Code, Sec. 1756.)

No court of this state other than the Supreme Court has jurisdiction to review a decision and order of the Public Utilities Commission. (*Pacific Telephone Co. v. Eshleman*, 166 Cal. 640, 689 (1913); Public Utilities Code, Sec. 1759.)

III.

The Court Shall Exercise an Independent Judgment on the Law and the Facts.

In any proceeding in which the validity of the Commission's order or decision is attacked on the ground that the order or decision violates a constitutional right of the petitioner, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings of the Commission that are material to the determination of the constitutional question are not determinative. (*Market St. Ry. Co. v. Railroad Commission*, 24 Cal. 2d 378, 398 (1944).)

IV.

The Unexplained Refusal of the Respondent Commission to Hear Evidence on Rehearing Constitutes Abuse of Discretion and Requires the Issuance of a Writ of Certiorari or Review.

Public Utilities Code, Section 1736, provides that the Commission may abrogate, change or modify an order theretofore made ". . . after . . . rehearing and a consideration of all the facts, *including those arising since the making of the order or decision . . .*" (Emphasis added.)

In this matter, the Commission after being apprised of new, material and relevant evidence refused to hear it or consider it.

In protecting the constitutional rights of persons before administrative bodies, the courts consistently have required such bodies to reopen proceedings for the presentation of new, material and relevant evidence. (See generally, 73 C. J. S. pp. 1139-1142, Sec. 61; 2 Cal. Jur. 2d p. 277, Sec. 165.)

Thus, on showing of good cause therefor, an administrative body must take further evidence and then appropriately rescind, alter or amend its decision. (See *Western Pipe Co. v. Industrial Accident Com.*, 126 Cal. App. 225, 227 (1932).) The offer of new or additional evidence has been held to be good cause, warranting the reopening of a case. (*Brunski v. Industrial Accident Com.*, 203 Cal. 761, 766 (1928); *Merritt, Chapman & Scott Corp. v. Industrial Accident Com.*, 6 Cal. 2d 314, 317 (1936).)

This Court's comment, in *Sandby v. Railroad Commission*, 191 Cal. 226 (1923), on Respondent Commis-

sion's refusal to hear additional evidence is directly applicable to the instant case.

In the *Saunby* case, the Commission had issued an order with respect to the rates of the petitioner utility, which order had become final. Thereafter, the Commission was advised that changed circumstances had affected the reasonableness of the ordered rates. Thereupon, the Commission reopened the rate hearing. At the reopened hearing, the Commission announced it would limit the scope of the hearing to the change in economic conditions; but at the same time the Commission announced that it would institute another hearing in which all of the fundamental issues, including rate base, rate of return, taxation and depreciation would be considered. Since all the fundamental issues would be fully examined in the two hearings, this Court held that no denial of due process had occurred. But this Court observed:

> ". . . if the record in the instant proceeding disclosed that by the limitations which the Commission placed upon the immediate inquiry before it, these petitioners had been finally denied a hearing upon any question vital to a just and proper fixation of rates which this corporation should be allowed to charge the consumers of its product, and that such denial had resulted, or would result, in depriving them of property through the imposition of unjust and irregular rates, they might have recourse to the courts for relief . . ." (p. 231). (Also, see 41 Cal. Jur. 2d 311, Sec. 68.)

In the present case, Petitioner's request for rehearing stated that Petitioner would submit on rehearing evidence of two distinct catagories:

(1) The actual operating revenues and expenses of the Petitioner *prior* to May 8, 1959; and

(2) The substantial increase in Petitioner's operating costs subsequent to May 8, 1959.

Both types of evidence would obviously bear upon the reasonableness of the rate reduction when coupled with the metering requirements, and the ability of Petitioner to comply with the metering order.

A principal issue in the rate determination was Petitioner's operating costs and capital investment in the then immediate future, 1959 and 1960, during which the rates to be established would be in effect. This projection was admittedly a difficult task because of Petitioner's exceedingly rapid rate of growth in an area (Garden Grove, Orange County) of great population expansion. The only *actual* figures of costs available during the hearings were those of 1957, when Petitioner served a little more than half of its present customers, and of prior years. Only conflicting and contradictory *estimates* of the 1958 and early 1959 costs and investments were available.

Petitioner sought to bring the *actual* 1958 and 1959 figures before the Commission in the requested rehearing. The Commission's flat, unexplained refusal to hear this evidence was an abuse of its discretionary powers. This Court stated in *Market St. Ry. Co. v.*

Railroad Commission, supra, 24 Cal. 2d 378, 401 (1944): *"the actual experience of the company is more convincing than tabulations of estimates . . . Elaborate calculations which are at war with realities are of no avail."* (Emphasis added.)

In addition, by affidavit and verified petition, Petitioner represented to Respondents that it would present evidence that the Order was unreasonable and impossible of performance by Petitioner in that it coupled the rate decrease with an express command to: "immediately institute a metering program of not less than four hundred (400) meters per month, in addition to metering all new service connections, until all residential and other general service connections have been metered."

Petitioner represented that, in light of Petitioner's present financial ability, and the cost of materials, equipment and labor necessary for the ordered metering program, the actions ordered could not be performed by Petitioner. Petitioner represented that on rehearing of the case, it was prepared to, and would introduce substantial evidence, both oral and documentary, in support of such allegations.

The requirements of due process of law apply throughout the proceedings before the Public Utilities Commission. The Respondent Commission may not unreasonably refuse to hear additional evidence, the existence of which is fully apprised, by the simple expedient of denying a petition for rehearing without opinion. If a party has been denied a hearing on matters vitally affecting the result of a determination by an administrative body, the party has a right of recourse to the courts. (*Saunby v. Railroad Commission, supra,* 191 Cal. 220, 231-232 (1923).)

V.

A Decision and Order of the Respondent Commission Which Is Unsupported by the Evidence Is Void.

A decision and order of the Public Utilities Commission made without any or substantial evidence to support it, or based upon supposed facts, not introduced in evidence, is arbitrary and capricious, and is a denial of due process of law. (*I. C. C. v. U. P. Ry. Co.*, 222 U. S. 541, 547 (1912); *I. C. C. v. L. & N. Ry. Co.*, 227 U. S. 88, 91 (1913); *Ohio Bell Telephone v. Public Utilities Commission*, 301 U. S. 292, 302-304 (1937); See also, *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 477-491 (1951).)

The opinion and order is erroneous and constitutes an arbitrary and capricious action by the Commission, in that the opinion expressly adopts and finds that the ". . . sections of the proposed report [Exhibit One to the Petition] dealing with factual and evidentiary matters constitute true statements of the evidence and of the facts." But the order itself [Exhibit Two to the Petition] is completely inconsistent with, and directly contrary to, the recommended order of the proposed report, which rested on the same evidentiary base as that of the opinion and order.

In purporting to adopt the factual findings of the proposed report but rejecting the recommended order of that proposed report without notice, hearing, or the taking of additional evidence, the Commission denied Petitioner due process of law. The constitutional requirements of fairness extend to all parts of the administrative procedure. The patent inconsistency of adopting the proposed report as the evidentiary base, but rejecting *in toto* the recommended order of the proposed

report almost ten months after the proposed report was filed constitutes a denial of the right to a fair hearing to Petitioner.

The Commission's opinion states as a justification of its order: "The record indicates, from the testimony of Petitioner's president, that the financing of a metering program would be feasible." [Tr. 1974-1977.] This is a flat misstatement. The record does not indicate that the installation of four hundred (400) meters a month is economically feasible without increased revenues; to the contrary, Petitioner's President testified [Tr. 1974, lines 5-10, incl.] that metering could be financed "*out of the increased revenues*" that are denied by the order.

VI.

Petitioner Was Prejudiced by the Respondent Commission's Refusal to Limit the Decision to Evidence in the Record of the Proceedings.

Petitioner has never had an opportunity to orally argue the merits of the Application of the case before any official other than the hearing officer, although Petitioner requested such argument and the Commission had set argument on the Application and case before the Commission, *en banc*, on May 19, 1959.

On May 12, 1959, the Commission denied Petitioner's May 8, 1959 [Tr. 2062-2068] motion for a supplemental hearing to determine whether the Commission would consider material outside the record in the making of its decision, and on May 12, 1959, the Commission vacated the setting of argument before the Commission, *en banc*. Petitioner was denied the opportunity to establish whether the application and the case would be resolved by and with reference solely to the record

of the proceedings and not by unfounded and unsubstantiated allegations outside the record.

The Commission justified its denial of the motions on the theory that they would serve no purpose because the Commission was concurrently granting Petitioner's motion for a proposed report by the hearing officer who heard the evidence. The clear inference was that the Commission's orders would substantially follow the recommended order of the proposed report and that Petitioner's rights would be safeguarded by its opportunity to examine and make exceptions to the proposed report and its recommended order.

Petitioner reconciled itself to compliance with the terms of the recommended order of the proposed report and for almost ten months stood ready to comply with it. During that time, believing the Commission would adopt or substantially follow the recommended order of the proposed report, Petitioner took no steps to bring additional evidence to the Commission's attention, to re-open the hearing for any purpose, or to request argument in the Application and case before the Commission, *en banc*.

Petitioner was led to litigate and contest the Application and the case within the narrow confines of the proposed report and to refrain from the presentation of material and argument to the Commission itself, believing that the order of the Commission would bear a reasonable relation to the recommended order of the proposed report of which it was apprised.

Thus the Petitioner was denied a fair hearing. The proposed report was but a straw man. The recommended order of the proposed report was not adopted by the Commission, and Petitioner had no opportunity

even know what material was being considered by the Commission or being received by the Commission from its staff in arriving at the opinion and order which is the subject of this Petition.

The opinion states:

> "After making appropriate modifications to the staff-derived figures so as to recognize reasonable increased revenues, greater expenses and a higher rate base for a properly metered system and giving due cognizance of the trend of rate of return as occasioned by the refunding of advances for construction during the year 1960 and subsequent years, the Commission concludes that Petitioner would earn a rate of return of somewhat more than 7 per cent on a depreciated rate base of approximately $2,269,000."

It would appear from the quoted statement that material outside the record was considered by the Commission, and that on consideration of such extraneous matters, the recommended order of the hearing officer based upon evidence within the record was rejected. The rule is clear that where an administrative body makes a determination *contrary* to that of its hearing officer, the administrative body must make an examination of the record and decide therefrom. (*Pacific Indemnity Company v. Industrial Accident Commission*, 28 Cal. 2d 329, 339 (1946); *Taylor v. Industrial Accident Commission*, 38 Cal. App. 2d 75, 82 (1940).)

VII.

Uncertain or Inconsistent Findings Must Be Annulled.

The opinion and order is uncertain and unclear in that it is impossible to ascertain therefrom the effect of

present and anticipated federal income taxation on Petitioner's revenues. The opinion and order states:

> "The question of what rate treatment should be given to reduce federal income tax payments, resulting from the use of accelerated depreciation as permitted by Section 167 of the Internal Revenue Code, is under consideration by the Commission and pending determination of the problem by the Commission we have considered straight-line depreciation for income tax purposes in this matter. When decision is made by the Commission as to the use of accelerated depreciation, then such necessary adjustments, if any, will be made by the Commission in respect to income tax payments made by the utility."

In view of these statements, Petitioner is unable to ascertain the present and anticipated consequences of the opinion and order with respect to the payment of and allocation for anticipated income tax obligations.

Where the findings of the Public Utilities Commission are inconsistent with respect to the principal issue involved, the orders based on such findings should be annulled. (*Cal. Portland Cement Co. v. Public Utilities Commission*, 49 Cal. 2d 171, 176 (1957).)

VIII.

The Order With Respect to Metering Is Beyond the Respondent Commission's Jurisdiction.

The Public Utilities Commission is not the body expressly charged by the legislature with responsibility for the conservation of water supplies in the State of California. There is no statutory authorization for the Respondent Commission to *compel* a public utility to make

a substantial additional capital investment, without reimbursement from users, so as to meter an existing water system. The order complained of is beyond the Commission's power. (See, W. G. Wadley, 2 C. R. C. 794.)

IX.

The Rates Ordered by the Respondent Commission Are Confiscatory and Constitute a Denial of Due Process of Law.

A utility must be allowed a fair return on its property (*See, Market St. Ry. Co. v. Railroad Commission, supra* 24 Cal. 2d (1944); and see generally, 43 Am. Jur. p. 674, Sec. 156; 73 C. J. S. p. 1034, Sec. 24 (b).)

If the rates of the Commission are confiscatory, and do not allow a fair return, the utility is denied due process of law. (*Los Angeles Gas & Electric Corp. v. Railroad Com.*, 289 U. S. 287 (1933).)

The valuation of its property for this purpose is denominated a "rate base". (See, 41 Cal. Jur. 2d p. 307, Sec. 65.) As stated by the Supreme Court, the case law

> ". . . permits unreasonableness to be shown, not by the method employed to formulate a rate base, but by the fact that *the 'end result' of the commission's order interferes with the company's successful operation, its financial integrity, its ability to maintain credit and attract capital, and to compensate investors for risks assumed*—in short, fails to provide a return sufficient to induce the utility enterprise to 'perform completely and efficiently its functions for the public' " (*Market St. Ry. Co. v. Railroad Commission, supra*, 24 Cal. 2d 387, 397 (1944; emphasis added.)

The confiscatory nature of the Commission's order is shown by even a cursory examination of the facts of the instant matter.

In late 1957, Petitioner's basic rate, the residential flat rate, was $3.00 a month. This was the same rate charged in 1952 prior to the construction of more than 90% of Petitioner's water system. At that time, Petitioner applied to increase its basic rate to $4.50 a month. The Commission found that Petitioner, with the basic rate of $3.00, faced a financial emergency and issued an interim order for a temporary rate of $3.75.

The hearing officer found that a permanent rate of $3.75 was reasonable and recommended it. The hearing officer also found and recommended that a special surcharge of 75¢ a month be authorized to defray the costs of a metering program. Thus, $4.50 was a reasonable total charge if the Petitioner was to be required to install meters.

The Commission's order requires Petitioner to incur the metering program expense at a $3.00 a month rate.

If the hearing officer's finding that a charge of 75¢ a month a user was required to meet the metering expense is reasonable (it should be noted that this surcharge would total about $17,500 a month in comparison to Petitioner's estimate of something in excess of $20,000 a month), then Petitioner's true basic rate under the Commission's order is only $2.25 a month, three-fourths of its rate in 1952.

Since Petitioner never paid any dividends to its stockholders (it has no bondholders) nor made any distribution of profits with its $3.00 rate and was

found to be in financial distress in 1957, it is clear that a true basic rate of $2.25 is confiscatory.

X.

Conclusion.

It is respectfully submitted that the Writ of Certiorari or Review prayed for should be issued directing the Public Utilities Commission to certify fully the record in said proceedings for review by this Court.

Dated: May 18, 1960.

/s/ FREDERICK L. SIMMONS,
RICHARD P. ROE,
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Attorneys for Petitioner, Dyke Water Company.

EXHIBIT F.

Petitioner's Closing Brief.

In the Supreme Court of the State of California.

Dyke Water Company, a corporation, Petitioner, v. Public Utilities Commission of the State of California, and Everett M. McKeage, Peter Mitchell, Matthew J. Dooley, C. Lyn Fox, and Theodore H. Jenner, Respondents.

I.

The Unexplained Refusal of the Commission to Grant Petitioner's Request for Rehearing Constituted an Abuse of Discretion and Requires the Issuance of a Writ of Certiorari or Review.

Petitioner's request for rehearing, filed March 31, 1960, stated that petitioner would submit evidence on its *actual* operating revenues and expense prior and subsequent to May 8, 1959, the date of submission of the matter, and, in addition the request stated that petitioner would submit evidence that the order was unreasonable and impossible of performance by petitioner.

In arguing that the Commission was not guilty of an abuse of discretion in denying the petition for rehearing, respondents have quoted extensively from *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 514-515, 88 L. Ed. 1420, 1428-1429 (1943). However, the situation presented to the Court in *Interstate Commerce Commission v. Jersey City, supra*, is, on its facts, substantially different from that presented in the instant proceeding. "In that case the railroad filed a petition for reconsideration more than one month after the order of the Commission had been issued. Almost three months after the petition for reconsideration,

the opinion and order of the Interstate Commerce Commission recited that "Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearings sought were held, we would feel warranted in modifying our findings as made in the second report."

In the case at bar, the petitioner did not seek the Commission's reconsideration of its decision on the facts already in the record or an opportunity to represent its case with additional argument; petitioner sought to advise the Commission of facts that came into existence, and evidence that became available for presentation, *after* the matter was submitted, and only relevant *after* the order was made.

The case at bar is far closer, on its facts, to *Atchison, Topeka & Santa Fe Railway Co. v. United States*, 284 U. S. 248, 257, 76 L. Ed. 273 (1932), where the Interstate Commerce Commission had issued a rate order and, thereafter, the utility filed a petition for rehearing in which it alleged that ". . . If the order of the Commission should become effective, it would, under the conditions then present, threaten the maintenance of an adequate system of transportation." In support of their allegations as to changed conditions, the petitioners submitted many other facts and statistical tables of traffic and revenues; however, the Commission refused to reopen the proceedings for the presentation of such evidence and the utility sought judicial relief in the Federal Courts, contending that the refusal of the Commission to reopen the proceedings constituted an abuse of discretion.

In ordering a reopening of the proceedings, Chief Justice Hughes, speaking for the Court, said (at pp. 259, 260, 262.)

> "Ordinarily, a petition for rehearing is for the purpose for directing attention to matters said to have been overlooked or mistakenly conceived in the original decision and thus invites a reconsideration upon the record upon which that decision rested. The second petition for rehearing, in this proceeding, was not of that character. It was of the nature of a supplemental bill. It presented a new situation, a radically different one, which had supervened since the record before the Commission had been closed . . . it [the petition for rehearing] asserted that whatever might be the view of the order when made, and upon that record, a changed economic condition demanded reopening and reconsideration."

The court further observed that

> ". . . the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice."

And the court concluded that

> ". . . in the discharge of its duty, a fair hearing is a fundamental requirement. [Citations] In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right."

The foregoing statement fully applies to the case at bar; however petitioner respectfully suggests that *neither* of the foregoing cases are determinative of the issue before this Court. Both *Interstate Commerce Commission v. Jersey City, supra,* and *Atchison, Topeka & Santa Fe Ry. Co. v. United States, supra,* are cases involving a Federal agency, acting under federal statutes during a period of depression and war, respectively, and both cases are relevant only as expressions of general principals of law in the area of judicial review of determinations by administrative agencies.

Exhaustive research has not disclosed a California case directly holding that it is an abuse of the Commission's discretion to deny a request for hearing on new evidence; however, we invite the Court's attention to the following recent decision by the Supreme Court of Vermont ordering that state's public Utilities Commission to reopen a rate hearing because of the Commission's refusal to grant a petition for rehearing supported by the utility's offer to present evidence of actual operations, when the order complained of was based on *estimates* of operational revenues and expenses, which was the only data available at the time of the hearing.

In *Petitions of New England Tel. & Tel. Co.*, 80 A. 2d 671, 116 Vt. 480 (1951), the Public Utilities Commission of Vermont had held hearings on a rate application during the summer of 1949; at that time only estimates were available for relevant periods of prior operations of the utility. As stated by the Court (at p. 688):

> "The hearings in this case before the commission took place during the summer and fall of 1949. The

findings were filed February 20, 1950, and were based upon estimates, since figures upon actual operating experience were only available for the latest twelve months ending August 31, 1949. On March 13, 1950 the Company filed a motion to reopen the hearing for the limited purpose of the presentation of evidence as to the Company's actual operating results during the year 1949. . . . This motion was denied (at p. 691). The motion to reopen and the exhibits attached thereto gave actual operating results for 1949. They showed wide differences between the amounts allowed by the commission in a considerable number of items."

The Commission contended before the Supreme Court of Vermont that such a procedure as requested by the utility ". . . . would have added to the labors of the Commission." The Court properly answered the contention with the statement that "Justice is not to be sacrificed to expediency . . . and the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice." The Supreme Court of Vermont then stated (at p. 792):

> "There is no particular formality about such a motion [for rehearing] as the State suggests, nor was it too late, because the evidence to be presented did not become available until the end of the year, and it was presented within the time reserved to file additional requests for findings. . . . Although the allowance of such a motion is discretionary, we think that its disallowance here constituted an abuse of discretion. It would not have taken long to hear the new evidence, and in view of the wide discrepancy between the Commission's

> estimates and the actual experience, the Commission should have gone to the trouble to hear the Company's evidence and the State's evidence in reply thereto. . . . Upon a new hearing the Commission can determine actual operating results for both 1949 and 1950, and it should do so. . . . The two orders of the Public Service Commission . . . are reversed, and both causes are remanded for a hearing de novo in accordance with the views herein expressed."

This Court has also expressed its judicial preference for actual experience in rate hearings (*Market St. Ry. Co. v. Railroad Commission*, 24 Cal. 2d 378, 401 (1944), and it has also stated that the Commission may not deny to an applicant a hearing upon any question vital to a just and proper fixation of rates *Saunby v. Railroad Commission, supra*, 191 Cal. 226, 231 (1923).)

The offer of new or additional evidence has been held to be good cause for reopening a case (*Brunski v. Industrial Accident Com.*, 203 Cal. 761, 766 (1928); *Merritt-Chapman & Scott Corp. v. Industrial Accident Com.*, 6 Cal. 2d 314, 317 (1936)), and the unexplained refusal of the Commission to grant the petition for rehearing constituted an abuse of discretion necessitating a reversal of the order of the Commission and an order directing the rehearing of the matter. (*Petitions of New England Tel. & Tel. Co., supra*, 80 A. 2d 671, 116 Vt. 480 (1951).)

II.

The Adoption of Conclusions Contrary to That of the Examiner, Although Adopting His Findings, Constitutes an Arbitrary and Capricious Action by the Commission, and Its Decision and Order Are Unsupported by the Evidence.

There is substantial case authority for the proposition that where an administrative body rejects the recommendation of its own examiner, its action is arbitrary and capricious and will be reversed by the Courts as an order unsupported by substantial evidence, since evidence which might otherwise support the order is rendered insubstantial by the fact that the preponderance of the evidence supports the recommendation of the hearing officer. (See *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 F. 2d 786, 789-790 (7th Cir. 1951); *In re United Corporation*, 249 F. 2d 168, 178 (3rd Cir. 1957), and *A. E. Staley Mfg. Co. v. National Labor Relations Board*, 117 F. 2d 868, 878 (6th Cir. 1941).).

In *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 496, 71 S. Ct. 456, 469 (1951), the United States Supreme Court stated the general doctrine on judicial review of administrative orders where a Commission rejects the recommendations of its hearing officer and arrives at an opposite or contrary determination. In the opinion, the Court observed (at p. 494)

> "... that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform."

and further (at p. 497)

> ". . . however halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything 'logically probative of some matter requiring to be proved.'"
>
> [Citations] ". . . It would reverse this process for courts to deny examiners' findings the probative force they would have in the conduct of affairs outside a courtroom. . . . On reconsideration of the record [the Court of Appeals] should accord the findings of the trial examiner the relevance they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial."

In California, this Court has held that in a proceeding in which the validity of the Commission's order or decision is attacked, the Supreme Court shall exercise an independent judgment on the law and the facts. (*Market St. Ry. Co. v. Railroad Commission, supra,* 24 Cal. 2d 378, 398 (1944), and in such a review the Court must consider the recommendation of the hearing officer.) (*Universal Camera Corp. v. National Labor Relations Board, supra.*)

In the case at bar, respondents have devoted almost eight pages of their brief to explanations of why the Commission might have been justified in reaching different conclusions from those of the examiner. However, their argument ignores the one fact which most clearly reveals the lack of substantial evidence to support the Commission's order—the fact that the hearing officer came to a different conclusion. The respondents' admission before this Court (answer of the re-

spondents, p. 22-23) that the hearing officer declined to propose an "orthodox determination of rate levels based on the rate of return concept" and instead proposed that the $3.75 flat rate be made permanent to avoid setting rates "at an unreasonably low level" is the crucial and significant fact which Commission ignored in its order.

In attempting to defend the order the respondents argue that the hearing officer should have arrived at a different conclusion—the conclusion that advocates for the Commission had advanced. But their argument, presented the hearing officer and again to this Court, does not in any way explain why the Commission refused to adopt the conclusion of its own hearing officer and instead, in effect, adopted the conclusions of its staff. In effect, the Commission wholly set aside the recommendations of the hearing officer before whom the matter was presented.

In the Federal Courts, in cases in which an administrative body has rejected the conclusions of its own hearing officer, the Courts have repeatedly pointed out the vital significance of the conclusions of the trial examiner, and the great weight which must be given to his conclusions.

For example, in *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission, supra*, 191 F. 2d 786, 789-790 (7th Cir. 1951), following hearings before a trial examiner, that officer rendered a report containing findings and a recommended order that certain charges in the complaint be dismissed. The matter was submitted to the Commission which thereupon rendered Findings of Fact and Conclusions of Law contrary to the report of the examiner and issued an order

to cease and desist certain practices referred to in the very charges which the hearing officer had recommended should be dismissed. The Company sought judicial review of the order of the Commission, contending the order was unsupported by substantial evidence, and pointing to the recommended order of the hearing officer. In reversing the order to the Commission, the Court (at p. 789) stressed the fact that the conclusions of the Commission differed from that of the examiner as follows:

> ". . . It is the duty of this Court to examine the record as a whole, *including the report of the examiner*, in order to determine whether the evidence supporting the Commission's order is substantial . . . *Evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.* The findings of the examiner are to be considered . . . The foregoing facts fully establish the examiner's finding . . . and they outweight the facts relied upon by the Commission in reaching the opposite conclusion. And while the findings of an examiner are not 'as unassailable as a master's' [Citation] *where it appears from the record that they are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary. Folds v. Federal Trade Commission*, 7 Cir., 187 F. 2d 648, 661." (Emphasis added.)

A similar statement and result are found in *In re United Corporation, supra*, 249 F. 2d 168, 178 (3rd Cir. 1957), where the Court said,

> "In the determination of whether the Commission's Order was supported by substantial evidence, the more specific findings of the Hearing Examiner, rejected by the Commission without the making of any new findings, are entitled to considerable weight."

And finally, in *A. E. Staley Mfg. Co., v. National Labor Relations Board, supra*, 117 F. 2d 868, 878 (1941), the Court observed

> ". . . while the report of the Examiner is not binding on the Board, yet where it reaches a conclusion opposite to that of the examiner, *we think the report of the latter has a bearing on the question of substantial support and materially detracts therefrom*" (emphasis added).

In the case at bar, respondent's argument ignores the clear purport of the foregoing cases. In substance respondent argues that the hearing officer should have agreed with the Commission's staff and reached a conclusion in accordance with the argument they advanced at the hearing of this matter at the administrative level. However, the hearing officer, who had heard the evidence, observed the witnesses and had lived with the case declined to do so. With his intimate familiarity with the case, the hearing officer made a recommended report which was, after objections by the parties thereto, submitted to the Commission. The Commission thereupon took the matter under submission, and took no action with respect thereto for nine months and

twenty-six days, until March 22, 1960, when it rendered decision 5928 in which the Commission adopted the findings of the proposed report with respect to factual and evidentiary matters but issued an order diametrically opposed the recommendations of the examiner.

On the record presented to this Court, the doctrine of *Universal Camera Corp. v. National Labor Relations Board, supra*, must be applied. This Court must examine the record as a whole, including the report of the examiner, to determine whether the evidence supporting the Commission's order is substantial (*Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission, supra*, 191 F. 2d 786, 789 (7th Cir. 1951)), and if the preponderance of the evidence supports the recommendations of the hearing officer, the action of the Commission in rejecting them is arbitrary. (*Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission, supra*; *A. E. Staley Mfg. Co. v. National Labor Relations Board, supra*, 117 F. 2d 868, 878 (1941).) As the Court indicated in *Taylor v. Industrial Accident Commission*, 38 Cal. App. 2d 75, 82 (1940), where an administrative agency disregards the recommendations of the hearing officer there is not necessarily any presumption in favor of the order complained of. This Court should command and require the Commission and its members to certify to this Court the records and proceedings in Case No. 5841, and thereafter reverse and annul the order as unsupported by substantial evidence.

III.

There Is Neither Statutory nor Case Authority Directly Authorizing and Empowering the Commission to Require a Water Company to Install Meters.

Whether the Public Utilities Commission has the *power* to require a public utility water company to meter its system is a question of vital importance to petitioner and also to every water company in the State of California, which is, or in the future may be under the jurisdiction of the Commission. Many domestic water systems in California are unmetered and presumably the management of the utility and their consumers desire and intend to remain on a flat rate basis, believing an unmetered system is economically and socially desirable.

The question raised in this proceeding is not whether a metered system is preferable or desirable, in terms of water engineering, either to the Commission or to the public utility water company. Nor is the question whether the management of the utility should meter the system when and as additional sources of water at a lower cost is made available to the utility as California's statewide water resources are developed.

The question raised in this proceeding is whether the legislature, in the enactment of the Public Utilities Code, has vouchsafed to the Commission the *power* to order metering of the system notwithstanding the determination of the management of the water company that metering is not in the best interests of the utility or the portion of the public which it serves. Extensive, and we believe exhaustive research on this question in the statutes and in decisions of the Appellate Courts of

this State has failed to disclose either a direct legislative authorization or an Appellate Court decision construing the Code to devolve such a power on the Commission. *W. G. Wadley*, 2 C. R. C. 794, 799 (1913); *Ida Jane Bartlett, dba Oildale Water Company*, 16 C. R. C. 438 (1919); and *W. W. Ward*, 27 C. R. C. 269, admittedly express the Commission's *preference* for metered water service, but these cases are not authority for the power of the Commission to order metering; indeed, it may be inferred from the language employed by the Commission in these decisions that the Commission lacks such power.

The question of the Commission's power to order metering of a water system has apparently never been raised before an Appellate Court of this State, possibly for the reason that the utility management has had the same preference for metering as the Commission, and therefore complied with orders of the Commission, not under the requirements of the law, but in exercise of the management's business judgment.

Title G. etc., Co. v. Railroad Commission, 168 Cal. 295 (1914), which respondent has cited in support of its contention that the Commission has the power to order the installation of meters held exactly the contrary. In that case on application for writ of certiorari, this Court annuled an order of the Railroad Commission requiring a water company to install meters because the Commission had not acquired the powers of a municipality to do so. In that case, the petitioner had been supplying water service to the City of Glendale. On application of the City, the Railroad Commission ordered the petitioner, a public utility water company, to install meters for persons living in the City of Glen-

dale and desiring connection for the service of water. In annulling the order of the Commission, this Court held that Section 549 of the Civil Code, by implication, gave to a city the power to prescribe rules relating to the delivery of water, including the installation of meters. This Court said (at p. 302) as follows: "The City of Glendale had exercised this power. It passed an ordinance in 1912 requiring water companies to lay service connections at their own expense on demand, giving them authority to install meters at their own expense, forbiding such companies to charge the consumer for meters, and declaring a violation of the ordinance to be a misdemeanor punishable by a fine, or imprisonment, or both." However, as the Court pointed out (at page 303), ". . . the railroad commission has not yet acquired the power to make regulations of this character for the government of water companies serving the inhabitants of the city of Glendale and that the order complained of is in excess of its power and for that reason invalid." In the case at bar, no contention is made that the Public Utilities Commission was exercising the power of a municipality under Civil Code Section 549. The Commission purports to exercise the power to order metering by virtue of the provisions of Sections 761 and 770 of the Public Utilities Code. However, neither of the foregoing sections were construed by this Court in *Title G. etc., Co. v. Railroad Commission, supra*, and petitioner respectfully submits that the question herein raised is one which this Court should resolve once and for all by annulling the order of the Commission complained of.

IV.

The Commission's Order Directing the Installation of Meters Was Unreasonable in the Circumstances at the Time It Was Made.

Respondent quotes extensively from testimony and evidence in the record and contends that in this proceeding petitioner should not now be heard to say that the order of the Commission, compelling metering of the system at the rate of 400 meters a month was unreasonable. The Commission argues that Dyke Water Company, having once acquiesced in the preference of the Commission for a metered water system, should not be heard to say the metering order is unreasonable; however, the reasonableness of the order must be considered in the light of the terms of the order and petitioner's circumstances at the time the order was made. The excessive number of meters required to be installed each month, the great capital investment, the considerable day to day expense required, and the precarious financial condition of the Company *at the time the order was made*, were all made known to the Commission in the petition for rehearing, denied without opinion or consideration. It requires no extensive review of the factual material recited in the briefs of petitioner and respondents to illustrate the unreasonableness of the terms of the order at the time it was made.

V.

The Rates Ordered by the Respondent Commission Are Confiscatory and Constitute a Denial of Due Process of Law.

Respondent argues (Answer of Respondents, p. 22) that petitioner would earn a 16.08% return in 1959 with a $3.00 flat rate; however, that argument pre-

supposes a rate base of approximately two million dollars ($2,000,000.00), which is the very point in issue. The Commission has stated that petitioner would earn a rate of return somewhat more than "7%" on a depreciated rate base of approximately $2,200,000.00. But proposed rates based on that low rate base were rejected by the hearing officer, and for good reason—the record will reveal that the City of Garden Grove has offered, and the Company has accepted the sum of approximately $7,000,000.00 for the Dyke Water Company's system. This fact, coupled with the fact that the Commission has ordered the Company back to its 1952 basic rate, is the strongest evidence of the confiscatory nature of the order of the Commission of which petitioner complains.

In *Market St. Ry. Co. v. Railroad Commission*, *supra*, 24 Cal. 2d 397 (1944), this Court observed that

> ". . . unreasonableness [may] be shown, not by the method employed to formulate a rate base, but by the fact that the 'end result' of the Commission's order interferes with the Company's successful operation, its financial integrity, its ability to maintain credit and attract capital, and to compensate investors for risks assumed—in short, fails to provide a return sufficient to induce the utility enterprise to 'perform completely and efficiently its functions for the public.'"

In *Market St. Ry. Co. v. Railroad Commission*, *supra* (at p. 401), this Court held that the price of a contract of sale by the utility to a city was the best evidence of the fair value of a utility under the conditions then existing.

In the case at bar, the hearing officer declined to accept the rate base which the staff advanced as the basis for the rates to be charged by the Company. And the rate base which the staff advanced, and on which the Commission purportedly made "modifications" is, on its face, wholly unreasonable considered in light of the fact that in an arm's length transaction, a municipality offered to pay approximately $7,000,000.00 for the system. Similarly, a $3.00 basic rate, the same rate which the Company charged over eight years ago, and which led to a condition of financial emergency, is, on its face, wholly unreasonable in a period of rising costs, inflation and population explosion of which this Court may take judicial notice.

VI.

Conclusion.

The writ of certiorari prayed for should issue from this Court directing the Public Utilities Commission to certify fully the record in the proceedings below, for review by this Court, and thereafter this Court should annul the order of the Commission and order the matter be reheard with appropriate directions.

Dated: January 3, 1961.

Respectfully submitted.

s/ FREDERICK L. SIMMONS,
RICHARD P. ROE,
H. O. VAN PETTEN, and
FREDERICK L. SIMMONS,
Attorneys for Petitioner, Dyke Water Company.

EXHIBIT G.

Decision of the California Supreme Court.

[S. F. No. 20479. In Bank. June 22, 1961.]

Dyke Water Company (a Corporation), Petitioner, v. Public Utilities Commission of the State of California *et al.*, Respondents.

Proceeding to obtain annulment of an order of the Public Utilities Commission reinstating rates for petitioner's water service in effect before an interim order authorizing increased rates, directing installation of meters, and requiring certain financial adjustments. Order affirmed.

Richard P. Roe, H. O. Van Petten and Frederick L. Simmons for Petitioner.

William M. Bennett, Chief Counsel, Roderick B. Cassidy, Assistant Chief Counsel, and J. Thomason Phelps, Principal Counsel, for Respondents.

McComb, J.—Petitioner, a public utility corporation in the water business in Orange County, seeks to obtain an annullment of an order of respondent Public Utilities Commission pursuant to the provisions of section 1756 of the Public Utilities Code.[1]

[1]Section 1756 of the Public Utilities Code reads: "Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued."

Chronology

(1) August 6, 1957, petitioner filed an application for authorization to increase its rates charged for water service. The application was amended on October 8, 1957. By such application petitioner sought authority to increase its rates for general flat rate service from a basic amount of $3.00 per service connection per month to $4.50 and to increase its general metered service rates from $2.50 per meter per month for the first 1,000 cubic feet or less to $3.75, with corresponding increases in the unit quantity rates.

(2) November 1, 1957, a public hearing on the amended application was held at Santa Ana, California.

(3) December 17, 1957, upon the record of the proceedings held November 1, 1957, the commission rendered its Decision No. 56003 (56 P.U.C. 105), making an interim order authorizing petitioner to increase its monthly residential flat rate from $3.00 to $3.75, with corresponding increases in the rates and charges in petitioner's general metered service schedule, pending final determination of the application.

(4) From December 26, 1957, through May 8, 1959, public hearings on the application for authorization to increase rates and an investigation on the commission's own motion into the rates, rules, regulations, contracts, operations, and practices pertaining to and involving water main extensions of petitioner were held at various times.

(5) May 5, 1959, petitioner filed a petition for a proposed report pursuant to rule 69 of the commission's Rules of Procedure.

(6) May 8, 1959, petitioner moved for a supplemental hearing to determine whether the commission

would consider material outside the record in the making of its decision.

(7) May 12, 1959, the commission denied petitioner's motion made May 8, 1959, but granted petitioner's application for a proposed report pursuant to rule 69.

(8) May 28, 1959, the proposed report of Examiner Stewart C. Warner was filed.

(9) No action was taken by the commission with respect to the proposed report for almost 10 months, until an opinion and order, Decision No. 59828, dated March 22, 1960, with an effective date of April 11, 1960, was filed by the commission.[2]

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[2]Decision No. 59828 reads as follows: "The above-entitled application of Dyke Water Company, a corporation, was filed August 6, 1957, and amended on October 8, 1957. The applicant sought and seeks authority to increase its rates for general flat rate service from a basic amount of $3 per service connection per month to $4.50, a 50 per cent increase, and to increase its general metered service rates from $2.50 per meter per month for the first 1,000 cubic feet or less to $3.75, with corresponding increases in the unit quantity rates, also representing an increase of 50 per cent. The estimated increase in gross annual revenues at the proposed rates is approximately $375,000.

"A public hearing on the First Amendment to the application was held before Commissioner Rex Hardy and Examiner Stewart C. Warner on November 1, 1957, at Santa Ana. The purpose of said hearing was to establish a record as to whether or not the applicant should receive interim rate relief. Based upon such record, an interim opinion and order (Decision No. 59003, dated December 17, 1957) authorized the applicant to increase its monthly residential flat rate from $3 to $3.75, with corresponding increases in the rates and charges in the general metered service schedule. Said interim decision found the existence of exigent circumstances, primarily a financial emergency, which justified the authorized increases in rates and charges.

"By an order dated October 30, 1959, the above-entitled investigation was instituted.

"Public hearings on both of the above matters were held on a consolidated record before Commissioner Hardy and Examiner Warner on December 26, 1957; before Commissioner Matthew

(10) March 31, 1960, petitioner filed a petition for a rehearing before the commission, which petition was denied May 9, 1960.

These questions are presented for our determination:

First. *Was the order to install meters beyond the jurisdiction of the commission?*

No. Section 761 of the Public Utilities Code reads: "Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices,

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J. Dooley and Examiner Warner on January 14 and 15, 1959, and before Examiner Warner on March 18, April 17, 20, 21, 22, 23, 24, 27, 28 and 30, and May 1, 1959, at Santa Ana, and May 5, 6, 7 and 8, 1959, in Los Angeles. Orange County Water District appeared as an interested party to urge that applicant be required to install meters on all customers' premises for water conservation purposes; Pacific Water Co. appeared as an interested party and as a protestant in so far as the proposed increase in rates for water service might affect certain areas where applicant was furnishing water service outside its certificated area and within the certificated area of Pacific; one customer of the applicant appeared to report the results of a survey made of applicant's customers in Midway City regarding their views on flat-rate service versus general metered service; 9 letters from customers were received and read into the record by the presiding officer at hearings when so received; and an exhibit was introduced by the applicant as an affidavit that 18,500 post cards had been mailed by the applicant on March 23 and 24, 1959, to its customers seeking their views on the questions of (1) whether they wanted meters installed at their houses, and (2) whether they would pay 75 cents more a month "to put your water company on a paying basis and sound financial position to preserve the low flat rate basis of water distribution which has been so successful here."

"On May 5, 1959, the applicant filed a Petition for Proposed Report pursuant to Rule 69 of the Commission's Rules of Procedure; on May 8, 1959, applicant's counsel moved for a supplemental hearing to determine how the Commission arrives at its

equipment, applicances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules."

Section 770 of said code reads: The commission may after hearing:

"(a) Ascertain and fix just and reasonable standards, classifications, regulations, practices, measurements, or service to be furnished, imposed, observed,

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decisions; on May 12, 1959, the Commission granted said petition and directed the presiding Examiner to prepare and file a proposed report, denied said motion for a supplemental hearing on grounds that it was improper, and concluded that, having granted the petition, oral argument before the Commission en banc would be unnecessary and cancelled such argument set for May 19, 1959.

"The proposed report was prepared and filed in accordance with such directions, pursuant to the Commission's Rule 70, on May 28, 1959. Exceptions thereto were filed, pursuant to Rule 71, by the applicant, by Pacific Water Co., and by the Commission staff, on June 19, 1959; by Orange County Water District on June 22, 1959; and by the City of Garden Grove on June 24, 1959. Replies to said exceptions were filed by Orange County Water District on June 30, 1959, and by the applicant on July 6, 1959. The matters stand submitted and are ready for decision.

"No material exception to evidentiary facts outlined in the proposed report was taken by any party, and such facts and review of the evidence in the proceeding need not be repeated herein. The Commission hereby finds that those sections of the proposed report dealing with factual and evidentiary matters constitute true statements of the evidence and of the facts and as such they are hereby adopted by the Commission.[1]

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[1] "The sections to which reference is here made are headed *General Information; Accounting Procedures; Earnings; Financial Conditions; Meters; Main Extension Practices; Metropolitan Water District; Water; Staff Recommendations;* and *Pacific Water Co. Evidence.*

and followed by all electrical, gas, water, and heat corporations.

"(b) Ascertain and fix adequate and serviceable standards for the measurement of quantity, quality, pressure, initial voltage, or other condition pertaining to the supply of the product, commodity, or service furnished or rendered by any such public utility.

"(c) Prescribe reasonable regulations for the examination and testing of such product, commodity, or service and for the measurement thereof.

"(d) Establish reasonable rules, specifications, and standards to secure the accuracy of all meters and appliances for measurements.

"Table 14-A of Exhibit No. 19 includes a Summary of Earnings for the years 1957, 1958 Estimated, and 1959 Estimated at prior interim and proposed rates at present operations, as follows:

Account	Year 1957 Recorded	Year 1958 Estimated	Year 1959 Estimated Present Operations Prior Rates	Interim Rates	Proposed Rates
	(Using Straight-Line Income Tax Depreciation)				
Operating Revenues	$875,025	$875,000	$751,000	$938,700	$1,126,200
Operating Expenses					
Oper. and Maintenance	219,575	232,900	249,800	249,800	249,800
Adm. and Gen., Misc. Exp.	135,020	70,000	72,200	72,200	72,200
Taxes other than Income	120,102	36,500	39,800	39,800	39,800
Depreciation	122,507	97,200	102,500	102,500	102,500
Taxes on Income	13,220	193,000	106,100	207,300	308,400
Total Expenses	610,424	629,600	570,400	671,600	772,700
Net Revenue	46,601	245,400	180,600	267,100	353,500
Depr. Rate Base	——	929,000	1,123,000	1,123,000	1,123,000
Rate of Return	——	26.42%	16.08%	23.78%	31.48%

"The record shows that since 1954 the applicant has computed and paid income taxes using accelerated income tax depreciation as a deductible expense, and no testimony was adduced by the applicant that it intended to claim income tax depreciation on any other basis for the year 1959 or for any future period.

"The question of what rate treatment should be given to reduce federal income tax payments resulting from the use of accelerated

"(e) Provide for the examination and testing of any and all appliances used for the measurement of any product, commodity, or service of any such public utility."

In Title Guar. etc. Co. v. Railroad Com., 168 Cal. 295, 302 [142 P. 878; Ann. Cas. 1916A 738], it was held that a city vested with regulatory powers over water companies in existence prior to the passage of the Public Utilities Act had the power to require them to install meters at their own expense, the requirement that meters be used being an incident of the rate-fixing process.

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depreciation as permitted by Section 167 of the Internal Revenue Code, as under consideration by the Commission, and pending determination of the problem by the Commission we have considered straight-line depreciation for income tax purposes in this matter. When decision is made by the Commission as to the use of accelerated depreciation, then such necessary adjustments, if any, will be made by the Commission in respect to income tax payments made by the utility.

"Based upon the entire record and being fully cognizant of the views of the various parties, the Commission makes the following findings and conclusions. In viewing such findings and conclusions it should be kept clearly in mind that the basic matters of concern in these proceedings are two: namely, applicant's request for increased revenues and the Commission's investigation of applicant's main extension practices. All other issues, although of some importances, are ancillary.

"In the basic matter of revenues, the Commission finds that the revenues produced by the rates authorized in the interim order herein (Decision No. 50003) have fully met the needs of the financial emergency then existing and foreseen. The Commission finds as a fact that there is not presently such an emergency situation as would necessitate or otherwise justify a continuance of the increased rates and charges authorized by such interim order. It is fair and reasonable and in the public interest, therefore, to terminate the rates and charges authorized on the interim basis.

"One ancillary issue directly affecting revenues and the earning position of applicant is that concerning the needs for metering of service connections. The evidence on this subject is substantial and convincing that the public interest requires that applicant's system be fully metered at the earliest practicable date. The

It is clear from the above-quoted sections of the Public Utilities Code that the Legislature intended to, and did, confer upon the commission power to require a public utility to install meters at its own expense. Such a power is necessary and desirable in order to prevent a waste of the product being distributed and discrimination as between consumers.

Second. *Was the commission's order directing the installation of meters unreasonable?*

No. In the present case the commission ordered as follows: "4.b. Dyke Water Company shall immediately institute a metering program and shall install, so as to permanently convert from flat rate to metered service,

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record indicates, from the testimony of applicant's president, that the financing of a metering program would be feasible.[2] It ap-

"[2]Testimony of Dyke Lansdale, TR 1974-1977.

pears reasonable, therefore, to require that applicant immediately undertake the installation of meters on existing service connections at a rate of no fewer than 400 meters each month until all have been metered. All new service connections, of course, shall be metered as they are placed in service.

"The Commission finds that applicant's estimates of revenues, expenses and rate base for the year 1959 are unrealistic, unreliable and unreasonable. The estimates of the Commission staff,[3]

"[3]As Contained in Exhibit No. 19.

however, are found to be fair and reasonable and are hereby adopted for the rate-making purposes of the proceeding. Such will be used in testing the reasonableness of applicant's earning position at the rates and charges in effect prior to the interim order herein. After making appropriate modifications to the staff-derived figures so as to recognize reasonable increased revenues, greater expenses and a higher rate base for a properly metered system and giving due cognizance of the trend of rate of return as occasioned by the refunding of advances for construction during the year 1960 and subsequent years, the Commission concludes that applicant would earn a rate of return of somewhat more than 7 per cent on a depreciated rate base of approximately $2,200,000. The Commission finds such a rate of return on such a rate base to be within the zone of reasonableness and concludes, therefore, that the pre-interim rates and charges for

not less than 400 meters per month, in addition to metering all new service connections, until all residential and other general service connections shall have been metered; and

"c. Shall, within ninety days after the effective date of this order and every one hundred eighty days thereafter, report to this Commission in writing the total number of meters installed, together with the net number of meters installed during the period covered in each such report, until all of its service connections have been metered."

Several years before, in a prior decision, No. 53858, reported at 55 P.U.C. 235, issued on October 1, 1956,

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water service will, during the foreseeable future, enable applicant to fully meter its system, provide sufficient and properly qualified personnel function efficiently, conform to all the requirements of law and to earn a fair and reasonable return on its investment in plant devoted to public utility water service. The pre-interim rates will be reinstated.

"In the basic matter of main-extension practices, the Commission finds that applicant has extended its water system into territory into which it had no right to extend, and pursuant to agreements which are unlawful.[4] Such extensions have been

"[4]See Exhibit No. 44.

imprudent and the resulting involvement in making repayment of large sums of money out of revenues to defray the cost of capital additions to applicant's plant, both within and without applicant's certified area, made by persons as advances for construction, clearly constitutes unlawful conduct; reveals a failure to recognize the minimum responsibility incumbent on the part of applicant's management; and indicates a failure to apply prudent management principles in the conduct of applicant's public-utility water business. Further, it appears that applicant may have contracted for long-term debt[5] without having obtained this Commission's

"[5]In the sum of $3763078 as shown in Exhibit No. 57.

authority therefor as required by law. The Commission would be derelict in its duty of protecting the public interest if it were to countenance any continuation of these unlawful and imprudent practices or permit the burdening of utility customers with added costs attributable to such improper practices. The Commission

in which petitioner was granted a certificate of public convenience and necessity authorizing water service in an extensive area in Orange County, the commission had ordered petitioner to install meters in the following language: "1. (e) That Dyke Water Company shall forthwith institute a program of metering of water service in the certificated areas shown on the map, Appendix A, and shall report its progress in writing to the Commission within ninety days after the effective date hereof and every ninety days thereafter for a period of four years."

There was good reason for this order. As early as July 7, 1954, the following resolution was adopted by the Board of Directors of the Orange County Water District:

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concludes that applicant must immediately cease and desist from any extension practice which does not comply strictly with the lawfully effective Rule No. 15 concerning main extensions.

"The Commission finds as a fact that the public interest and standard accounting practices require that applicant should be directed to adjust its books of account to conform to the balance sheet as of December 31, 1957, after adjustments, as shown on Table 4-B of Exhibit No. 19; that applicant should be directed to continue to carry out and place into effect the staff recommendations contained in Chapter 16 of Exhibit No. 19; and that applicant should be directed to immediately dispose of its recorded contributions pursuant to the classification and itemization in Appendix C of Exhibit No. 44 in accordance with the staff recommendations contained in Chapter 4 of said exhibit.

"The Commission finds as a fact that the rates and charges for water service hereinafter ordered to be reinstated are for the future fair and reasonable rates and are justified by the record in this proceeding. Further, it is found as a fact that in so far as existing rates and charges differ from those hereinafter prescribed, such existing rates and charges are for the future unjust and unreasonable.

"ORDER

"Application as above entitled, as amended, having been filed, and an investigation on the Commission's own motion into the rates, rules, regulations, contracts, operations and practices pertaining to and involving water main extensions of Dyke Water

"Whereas, it has been called to the attention of the members of the Board of Directors of the Orange County Water District that a wasteful usage of water is occurring in many of the residential sections located within the Orange County Water District; and

"Whereas, analysis of this situation indicates that most of this wasteful usage of water prevails in areas where water is being served to the individual users on a 'flat rate' basis; and

"Whereas, one of the powers of the Orange County Water District as defined in Paragrpah 6 of Section 2 of the OCWD Act as amended reads as follows: 'For the common benefit of said district, to store water in underground water basins or reservoirs within or outside of said district, to appropriate and acquire

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Company, a corporation, having been instituted, public hearings having been held, an Examiner's Proposed Report and Exceptions and Replies to said Report having been filed and having been fully considered, and based on the record and the findings of fact and conclusions hereinbefore set forth,

"It Is Hereby Ordered as follows:

"1. The rates and charges established by Decision No. 54003, issued December 17, 1957, and set forth therein as Appendix A, are hereby terminated as of the seventh day following the effective date of this order.

"2. Coincidental with the termination of said rates and charges there are hereby reinstated, as the regularly filed and effective rates and charges of the Dykes Water Company, tariff 'Schedule No. 1, General Metered Service, Cal. P.U.C. Sheet No. 6-W' and tariff 'Schedule No. 2, General Flat Rate Service, Cal. P.U.C. Sheets Nos. 116-W and 117-W.'

"3. Dyke Water Company is hereby directed to adjust its books of account to conform to the balance sheet as of December 31, 1957, after adjustments, as shown on Table 4-B of Exhibit No. 19 in this proceeding.

"4. a. Dyke Water Company shall install meters on all new service connections installed on and after the effective date of this order; and

"b. Dyke Water Company shall immediately institute a metering program and shall install, so as to permanently convert from

water and water rights within or outside of said district, to import water into said district, and to conserve water within or outside of said district';

"Now, Therefore, Be It Resolved, that the Secretary Manager be and he is hereby authorized and requested to bring this matter to the attention of the Public Utilities Commission, and request said Commission to do all within its power to require compliance of all utilities subject to its jurisdiction serving domestic water within the boundaries of the Orange County Water District with the following conditions:

(1) 'That totalizing water meters be installed on all service connections; and

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flat rate to metered service, not less than 400 meters per month, in addition to metering all new service connections, until all residential and other general service connections shall have been metered; and

"c. Shall within ninety days after the effective date of this order and every one hundred eighty days thereafter, report to this Commission in writing the total number of meters installed, together with the net number of meters installed during the period covered in each such report, until all of its service connections have been metered.

"5. Dyke Water Company is directed to continue to carry out and place into effect the staff recommendations contained in Chapter 16 of Exhibit No. 19.

"6. a. Dyke Water Company is directed to immediately dispose of its recorded contributions pursuant to the classification and itemization in Appendix C of Exhibit No. 44 in accordance with the staff recommendations contained in Chapter 4 of said exhibit; and

"b. Within ninety days after the effective date of the order herein, certify to the Commission in writing, over the signature of a responsible officer, that it has complied herewith.

"7. Dyke Water Company shall immediately cease and desist from entering into any contract for an extension of its water system or any part thereof except such as shall strictly comply with its Rule No. 15 or upon specific order of this Commission.

"8. Case No. 5841 is discontinued.

"9. The effective date of this order shall be April 11, 1960.

"Dated at San Francisco, California, this 22nd day of March, 1960."

(2) That applicable rates be established on a volume basis."

The commission's order to install meters was not challenged by petitioner. On the contrary, petitioner forwarded the following letter to the commission on February 11, 1957: "Referring to Decision No. 53858 and pursuant to ordering paragraph 1(e), we have had conferences with various meter companies in an effort to determine the cost and expense for metering.

"Proposals have been submitted to one meter company, and if accepted we will be able to commence some of the installations within six months.

"Will keep you advised as to our progress."

Other portions of Decision No. 53858, however, and certain related decisions, were challenged by petitioner in petitions for writs of review addressed to this court, on March 18, 1957, in S.F. 19057-19060. Nowhere in these petitions was any question raised with respect to the lawfulness or reasonableness of the commission's order to install meters.

On the contrary, petitioner continued to represent to the commission that meters were being installed. On May 6, 1957, it forwarded the following letter to the commission: "Referring to Decision No. 53858 and pursuant to order Paragraph 1 (e), we are submitting our second report.

"During the past ninety days we have installed the following quantities of meters:

45	⅝" meters
8	1" meters
5	1½" meters
5	3" meters
Total	33 meters

*The petitions were denied by this court without opinion, on August 27, 1957.

"We are preparing to commence installation of meters at the rate of fifteen to twenty per day and will report in ninety days further progress with respect to this."

On October 10, 1957, it forwarded the following letter to the commission: "In reference to Decision No. 53858, Order 1E, Dated October 1, 1956, this is to inform you that since January 1, 1957, we have installed eighty-two meters.

"We are installing meters regularly and will continue to do so."

On October 8, 1957, petitioner filed an amendment to its application, in which it requested "authority to place into effect immediately on an interim basis the rates as proposed in its original Application," representing to the commission that "The present financial condition of Applicant is such that emergency conditions exist."

The first public hearing was held on the amended application on November 1, 1957, at which time an expert witness, *testifying on behalf of petitioner*, after stating he was familiar with the commission's order on metering, was asked his opinion as to whether meters are necessary in this company's system. His reply was, *"I think they are essential."*

At the same hearing another expert witness, testifying on behalf of petitioner, in support of an estimate of petitioner's rate base for 1956 and succeeding years, stated that his estimate "reflects a start of a metering program which, by the end of the year 1961, meters 10,000 customers," using the principle of "metering services of this company at the rate of 2,500 per annum

starting January 1, 1958, which makes 10,000 meters as of the end of 1961."

This witness also testified in support of his estimates of "additional moneys necessary to finance Dyke Water Company." These estimates were of $100,000 a year for each of the years 1958 through 1961, inclusive, for a "metering program."

On December 17, 1957, as stated above, the commission issued Decision No. 56003, in which petitioner was authorized, on an interim basis, pending final decision, to charge substantially increased rates.

The matter was set for further hearing on December 26, 1957, but, at petitioner's request, was continued to a date to be later fixed.

Hearings were resumed on January 14, 1959. On January 15, 1959, the Orange County Water District expressed its concern that the metering program contemplated by petitioner, as reflected in the evidence above described, was inadequate, and offered evidence that annual water usage per service connection on petitioner's largely unmetered system was 0.94 of an acre-foot, compared with an average annual use of 0.57 of an acre-foot in four other nearby metered water systems, most of which had extensive industrial and commercial usage; that most of the water underlying the Orange County Water District is Colorado River water, imported under a ground water recharge program financed by a replenishment assessment levied at a uniform rate on all production of water from the ground water supplies of the district basin; that there was an unnecessary usage of approximately 7,000 acre-feet of water per year in the service area of petitioner; that water had been observed on many occasions running

down the curbs in places where unmetered water service was being rendered; that it would cost the district approximately $84,000 to replace these 7,000 acre-feet of water in the ground water supplies; that under the district's assessment plan petitioner would be required to pay only $27,300 of said $84,000; and that those using water from unmetered systems were being subsidized by those using water from metered systems. The district confirmed and again urged upon the commission it resolution of July 7, 1954.

On May 7, 1959, shortly before the matter was submitted, Dyke Lansdale, president of petitioner, when asked on cross-examination what steps had been taken it implement the commission's order to institute a metering program, stated that petitioner had started a program for installing meters on all industrial and odd or oversized lots and in schools; that only tracts did not have meters, and that "we have done very little tract work since the order was put out"; that "I feel that within the next two years it will be unnecessary for any of us to meter"; and that the only plans petitioner then had for the metering of flat rate customers was a plan to install a meter on those customers who had been reported as wasters of water.

Testifying in response to a question as to whether he had made any investigation with respect to the financing of a metering program, Mr. Lansdale answered in the affirmative, and said that petitioner had had several offers for the sale of meters on an installment plan; that there was one offer to "install the meter for us and bill us for an installed meter and they would take their money out of the increased revenues"; that the financing of a metering program through the water

meter suppliers or manufacturing companies was feasible; and that "you can get the metering company to make almost any type of an arrangement as long as they can get their money. I mean time isn't a big factor with them. There are three or four big metering companies and they are very, very competitive."

From the foregoing narrative it is clear that for the purposes of persuading the commission to grant it a rate increase petitioner professed wholehearted willingness to install meters, but that as soon as substantial rate relief was granted by the commission, to be effective for an indefinite period, the metering program was renounced.

When the commission issued its order on March 22, 1960, directing petitioner to install not less than 400 meters per month, petitioner had had three and a half years since the issuance of the commission's prior order on October 1, 1956, within which to formulate a plan of its own.

The commission gave no credence to the representations contained in Dyke Lansdale's affidavit of March 30, 1960, in support of petitioner's petition for rehearing with respect to the commission's March 22, 1960, order. The affidavit alleges in substance that the commission's order would impose an impossible financial burden on petitioner and jeopardize its service; that the installation of 400 meters per month would require the employment of seven working crews and a foreman, plus additional capital equipment and personnel. Even if these allegations were entitled to any credence, it is to be noted that they assume that petitioner would have to do the installation work, and that the cost of such work would exceed petitioner's financial resources.

But President Dyke Lansdale himself had previously testified that numerous metering companies would compete for the opportunity to do the work of installation on favorable credit terms.

At this late date petitioner is hardly in a position to complain that the commission's order of March 22, 1960, is impossible or unreasonable.

Nor was there anything unreasonable about requiring petitioner to bear the cost of installation of meters rather than imposing such cost upon the ratepayers. To require utility ratepayers to pay for capital installations in the form of meters not only is a departure from customary ratemaking, but also is wrong in principle. It results in a double burden upon ratepayers in that the ratepayers not only bear capital costs, but also continue, throughout the life of the plant installed, to produce a return to the utility upon the cost of the plant. (Cf. Title Guar. etc. Co. v. Railroad Com., supra, 168 Cal. 295, 302 et seq.)

Third. *Was the commission required to grant petitioner's request for a rehearing in order to hear evidence pertaining to the results of petitioner's operations occurring subsequent to the close of the hearings and before the issuance of the commission's decision?*

Rehearings are not matters of right before the commission, but are pleas addressed to the sound discretion of that body. The discretion to be invoked is that of the body making the order and not that of a reviewing court. (Interstate Commerce Com. v. City of Jersey City, 322 U. S. 503, 514 et seq. [64 S. Ct. 1129, 88 L. Ed. 1420].) It is therefore evident that in the present case petitioner's application for a rehearing was not improperly denied by the commission.

Fourth. *Was the commission justified in reaching different conclusions from those of the examiner, although adopting certain of his findings?*

Yes. In its decision the commission stated: "The Commission hereby finds that those sections of the proposed report dealing with factual and evidentiary matters constitute true statements of the evidence and of the facts and as such they are hereby adopted by the Commission."[4]

Petitioner contends that the commission's decision was "arbitrary and capricious" in adopting as true sections of the report but issuing an order that was inconsistent with, and contrary to, the recommended order of the commission's examiner. In support of this, petitioner contends that the commission was guilty of a "flat misstatement" in stating, "The record indicates, from the testimony of applicant's president, that the financing of a metering program would be feasible." This statement by the commission is supported by the record. The transcript shows the following testimony of President Dyke Lansdale: "Q. I want to confine my questions here principally right now to the financing and am I to understand from your statement that the financing of a metering program through the water meter suppliers or manufacturing companies is a feasible way to accomplish it? A. Yes. I feel that there are several different methods that could be worked. Q. Are feasible? A. Yes, it will work."

It appears from the examiner's proposed findings and conclusions that the examiner adopted as reasonable certain estimates, offered in evidence by the commission's

[4] In a footnote the commission identified the sections indicated by referring to the section headings used in the proposed report.

staff, of petitioner's revenue, expenses, and rate base for the year 1959. These estimates showed that petitioner would earn for the year 1959 a return of 16.08 per cent at the rates in effect prior to the rates authorized by the commission's interim decision; 23.78 per cent under the rates authorized by the interim order; 31.48 per cent at the rates proposed by petitioner in its application; and 11.90 per cent on the assumption that petitioner's entire system would be metered.

The reason why the old rates, as well as the interim and proposed rates, were calculated to yield such high returns is to be found in certain practices of petitioner involving extensions of its water mains to newly developed territory during a number of years from 1952 to 1958. Such extensions were governed, or should have been governed, by petitioner's Rule and Regulation Number 15, published and filed with the commission as a part of its tariff. This rule, when so published and filed, had the force and effect of a statute, and any deviations therefrom were unlawful unless authorized by the commission. (California Water & Tel. Co. v. Public Util. Com., 51 Cal. 2d 478, 501 [23] [334 P. 2d 887].)

Petitioner's rule in effect until August 15, 1955, provided that applicants for extensions to new subdivisions were required to advance and deposit with petitioner the estimated cost of construction, and that thereafter petitioner would pay to the depositor, for a period not to exceed 10 years, 35 per cent of the gross revenue due from consumers connected to the extension, but not more than the amount of such cost. A new rule prescribed by the commission, and effective on and after August 15, 1955, reduced the amount of the refunds to

22 per cent of the annual revenue from customers served from the extension, for not to exceed 20 years.

The evidence shows that from 1952 to 1958 petitioner entered into over 300 contracts for such extensions; that the advances under such agreements totaled $3,203,000; that many of these contracts required refunding at the rate of 35 per cent of petitioner's gross annual revenues from such extensions; that other such contracts involved unlawful deviations from petitioner's tariff rule; and that the refunds petition was required to pay constituted about one quarter of its gross revenues at the interim rates.

The Uniform System of Accounts for Water Utilities established by the commission prescribes the use of a deferred credit account called "Advances for Construction," in which shall be recorded "such advances for construction made in accordance with the utility's rules and regulations, as are to be refunded either wholly or in part. . . ."

When physical plant is constructed or installed with the use of such advances, it is required that the cost be recorded in a utility's appropriate plant accounts.

For rate-fixing purposes the commission as a matter of policy, in calculating a utility's rate base, deducts from the balance in the plant accounts the balance in the Advances for Construction Account. The reason for such a deduction is that the commission considers it unreasonable to allow a utility to earn a return upon property the cost of which has been advanced by prospective consumers or subdividers of property. (Del Este Water Co., 52 P. U. C. 479, 482 [1].)

Upon repayment of such advances, however, such deductions cease *pro tanto*, and plant costs defrayed by

such repaid advances become a part of the utility's rate base for rate-fixing purposes.

This policy of the commission, and the rate-fixing principles contained therein, were recently challenged in a petition for writ of review addressed to this court in Suburban Water Systems v. Public Utilities Com., S. F. No. 20484, which was denied without opinion on August 10, 1960.

Good reasons were offered by the commission's staff for declining to adopt all of the conclusions of the examiner, and the record supports the commission in the adoption of other and different findings and conclusions.

Fifth. *Did the commission err in not hearing oral argument of petitioner?*

No. Petitioner contends that it has been prejudiced, since it has never had an opportunity to orally argue the merits of the application and the case before any official other than the hearing officer, although petitioner requested such argument and the commission had set argument on the application and the case before the commission in bank on May 19, 1959.

Petitioner was given ample opportunity to be heard by the filing of exceptions to the examiner's proposed report. The commission's rules governing proposed reports are these:

"Upon direction by the Commission, the presiding officer shall prepare and file his proposed report. The Secretary's office shall cause copies thereof to be served upon all parties to the proceeding. Such proposed report shall contain recommended findings, conclusions, and order." (Rule 70.)

"A party may serve and file exceptions to a proposed report within twenty days after service thereof. Exceptions shall be specific, and stated and numbered separately. Exceptions to factual findings shall specify the portions of the record relied upon; proposed substitute findings; and proposed additional findings, with supporting reasons. Exceptions to conclusions shall cite statutory provisions or principal authorities relied upon; proposed substitute conclusions; and proposed additional conclusions." (Rule 71.)

"Replies may be served and filed within fifteen days after service of exceptions." (Rule 72.)

These rules were complied with in the proceeding before the commission. Petitioner was served with a copy of the proposed report and filed lengthy exceptions thereto, as well as a reply to exceptions filed by other parties.

Arguments may be either written or oral. Due process requires no more. In the case of Federal Communications Com. v. WJR, 337 U. S. 265, 275 [69 S. Ct. 1097, 93 L. Ed. 1353], the Supreme Court of the United States stated: ". . . due process of law has never been a term of fixed and invariable content. This is as true with reference to oral agrument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument *is essential to a fair hearing* [citation], in others that argument submitted in writing is sufficient. [Citations.]"

In Morgan v. United States, 298 U. S. 468, 481 [56 S. Ct. 906, 80 L. Ed. 1288], it was said: "Argument may be oral or written. The requirements are not technical."

In the present case it is evident that petitioner had ample opportunity to present written arguments to the commission, and the commission was not required to hear oral arguments.

Sixth. *Did the commission err in considering material outside the record?*

No. The commission's order provides: "After making appropriate modifications to the staff-derived figures so as to recognize reasonable increased revenues, greater expenses and a higher rate base for a properly metered system and giving due cognizance of the trend of rate of return as occasioned by the refunding of advances for construction during the year 1960 and subsequent years, the Commission concludes that applicant would earn a rate of return of somewhat more than 7 per cent on a depreciated rate base of approximately $2,269,000."

Petitioner contends: "It would appear from the quoted statement that material outside the record was considered by the Commission, and that on consideration of such extraneous matters, the recommended order of the hearing officer based upon evidence within the record was rejected."

The commission first ordered petitioner to install meters in 1956 and had evidence before it of a continuing urgent need for such installations. When it decided to order petitioner to install a specific minimum number of meters per month, it assumed that petitioner would do so, and that its plant in service, *i.e.*, rate base, would thereby be substantially increased.

The commission also assumed that petitioner would perform its contractual obligations to refund advances for construction, thus diminishing the balance in its

"Advances for Construction" account, and thereby increasing its rate base.

With a rate base increasing as a result of these two factors, petitioner's rate of return would show a downward trend during 1960 and subsequent years from 16.08 per cent, estimated at the prior rates, to something approximating 7 per cent.

If these assumptions had not been made by the commission, it might have been constrained to reduce petitioner's rates even below what they were when the application for an increase was filed in order to reduce the excessive 16.08 per cent return.

These assumptions, however, rested upon evidence in the record, and it cannot be justly said that they involved consideration of "material outside the record."

There is likewise no merit in petitioner's contention that "Petitioner had no opportunity to even know what material was being considered by the Commission or being received by the Commission from its staff in arriving at the opinion and order which is the subject of this Petition," in view of the fact that exceptions to the proposed report of the examiner were filed by the commission's staff and served upon petitioner.

In the instant case the commission had the record before it, and nothing appears to rebut the presumption that the decision of the commission was made after a consideration of the record. (Pacific Indem. Co. v. Industrial Acc. Com., 28 Cal. 2d 329, 339 [6] [170 P. 2d 18].)

Seventh. *Did the commission err in failing to consider evidence of petitioner?*

No. Petitioner has not pointed out any evidence that the commission failed to consider.

Eighth. *Was the commission's decision unlawful because of its treatment of federal income taxes?*

No. In its decision the commission said: "The question of what rate treatment should be given to reduce[d] federal income tax payments resulting from the use of accelerated depreciation as permitted by Section 167 of the Internal Revenue Code, is under consideration by the Commission, and pending determination of the problem by the Commission we have considered straight-line depreciation for income tax purposes in this matter. When decision is made by the Commission as to the use of accelerated depreciation, then such necessary adjustments, if any, will be made by the Commission in respect to income tax payments made by the utility."

Petitioner says this is "uncertain and unclear" in that "it is impossible to ascertain therefrom the effect of present and anticipated federal income taxation on Petitioner's revenues," and "Petitioner is unable to ascertain the present, and anticipated consequences of the opinion and order with respect to the payment of and allocation for anticipated income tax obligations."

It is not clear just what petitioner means. Obviously nothing the commission says can affect petitioner's obligation to pay its taxes.

Following the case of Galveston Elec. Co. v. City of Galveston, 258 U. S. 388, 399 [7, 8] [42 S. Ct. 351, 66 L. Ed. 678], the commission for rate-fixing purposes has recognized and allowed income taxes as an operating expense. The amount of such taxes is usually arrived at after a deduction for depreciation of depreciable property.

Section 167 of the Internal Revenue Code of 1954 permits, at the taxpayer's option, several ways of calculating depreciation for income tax purposes. Among them are: "(1) the straight line method; (2) the declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in paragraph (1)."

Following the adoption of this legislation by Congress, the commission was repeatedly faced, in numerous public utility rate proceedings, with the difficult problem of what amount of money to allow for income taxes as an operating expense in cases where the utility had elected, or indicated its intention to elect, a method of accelerated depreciation for income tax purposes, thereby increasing the depreciation deduction, and decreasing the amount of taxes paid or to be paid.

Various alternatives were open, among them being (a) an amount calculated by the straight-line method irrespective of what method was used in calculating the amount of taxes that were actually paid or to be paid; and (b) allowance only of taxes actually paid, or to be paid, under whatever method of depreciation the utility elected.

In the present proceeding the evidence shows that petitioner had elected the double rate, declining balance method of computing depreciation, thereby increasing the depreciation deduction and decreasing the amount of income taxes it would actually pay.

For rate-fixing purposes, however, and for the reasons given, the commission recognized the larger amount of tax which would have resulted from the use of straight-line depreciation. This, of course, re-

dounded to petitioner's advantage, in that it reduced the amount of net income after taxes recognized by the commission as available for return on rate base, and tended to strengthen petitioner's showing in support of its request for increased rates.

Ninth. *Were the rates fixed by the commission confiscatory?*

No. Petitioner says that the confiscatory nature of the commission's order is shown by even a cursory examination of the facts in the instant case. Petitioner's argument in support of this statement is erroneous.

First, it assumes that the financial emergency which the commission found in December 1957 in issuing an interim rate order upon a limited and incomplete record was proven by the complete record, and that such emergency continued through December 31, 1958. In its final decision, however, the commission found, "In the basic matter of revenues, the Commission finds that the revenues produced by the rates authorized in the interim order herein (Decision No. 50003) have fully met the needs of the financial emergency then existing and foreseen. The Commission finds as a fact that there is not presently such an emergency situation as would necessitate or otherwise justify a continuance of the increased rates and charges authorized by such interim order. It is fair and reasonable and in the public interest, therefore, to terminate the rates and charges authorized on the interim basis."

This finding was fully justified by the evidence of estimates that petitioner would earn a 16.08 per cent return in 1959.

Secondly, petitioner's argument assumes that the interim rate of $3.75 was reasonable because the examiner

proposed such a conclusion. But for good reasons the commission was fully justified in declining to adopt that conclusion.

Thirdly, petitioner's argument assumes that it was reasonable to impose upon petitioner's consumers a surcharge of 75 cents per month each for meters. But for the reason that petitioner's own president testified the financing of meters was not a problem, and that a surcharge would impose a double burden on the ratepayers, the commission was justified in refusing to impose such a surcharge.

Fourthly, petitioner argues that its failure to pay any dividend demonstrates that a $3.00 rate is confiscatory. It cites no authority for such a position, and none has been found.

This court in Market St. Ry. Co. v. Railroad Com. 24 Cal. 2d 378, 397 [150 P. 2d 196], said: "Thus responsibility for rate fixing, insofar as the law permits and requires, is placed with the commission, and unless its action is clearly shown to be confiscatory the courts will not interfere"; and on page 399 [2], [24 Cal. 2d]: "... The petitioner herein must be charged with the burden of showing that the evidence does not support the commission's finding of value, and that the reduced rate is unreasonable and will result in confiscation of its property." That burden is coupled with a strong presumption of the correctness of the findings and conclusions of the commission."

In Federal Power Com. v. Hope Natural Gas Co. 320 U. S. 591, 602 [64 S. Ct. 281, 88 L. Ed. 333], the court said: "... the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its ratemaking func-

tion, moreover, involves the making of 'pragmatic adjustments.' . . . . And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. . . . Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. [Citations.] It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end."

The order of the commission is affirmed.

Gibson, *C. J.*, Traynor, *J.*, Schauer, *J.*, Peters, *J.*, White, *J.*, and Dooling, *J.*, concurred.

EXHIBIT H.

Petition of Dyke Water Co. for Rehearing of Decision Filed June 22, 1961, and Memorandum of Points and Authorities in Support Thereof.

In the Supreme Court of the State of California.

Dyke Water Co., a corporation, Petitioner, vs. Public Utilities Commission of the State of California and Everett C. McKeage, Peter E. Mitchell, Matthew J. Dooley, C. Lynn Fox and Theodore H. Jenner, Respondents.

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Dyke Water Company, petitioner herein, applies for and petitions for a rehearing of the decision of this court in the above captioned matter filed June 22, 1961, pursuant to the provisions of the Rules on Appeal adopted by the Judicial Counsel, and in support thereof respectfully shows as follows:

I.

Petitioner re-alleges and incorporates herein by reference each and every allegation, statement and representation contained in the Petition for Writ of Certiorari on Review on file herein, together with each and every allegation, statement and representation contained in the Memorandum of Points and Authorities in support thereof.

II.

Petitioner requests this court, on notice to all parties, order a reconsideration and rehearing of the decision on file herein, with oral argument before the court, at such time or times as the court shall hereafter order.

III.

Petitioner further requests this court to order an extension of the time at which said decision would otherwise become final, directing the clerk to withhold issuance of the remittitur for an additional period of thirty (30) days, if, and in the event this petition for rehearing is denied, to enable petitioner to prepare, and file with this court, an application for an order staying the effect of the order of the respondent Commission, decision No. 49828, issued March 22, 1960, and to file appropriate pleadings before the Supreme Court of the United States.

Respectfully submitted,

FREDERICK L. SIMMONS for
RICHARD P. ROE,
H. O. VAN PETTEN,
FREDERICK L. SIMMONS,
Attorneys for Dyke Water Company, Petitioner.

Dyke Lansdale, being first duly sworn, deposes and says: That he is the president of petitioner herein, and has authority to make this verification for and on behalf of said corporation; that he has read the foregoing Petition for Rehearing and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

DYKE LANSDALE.

State of California, County of Los Angeles—ss.

On July 7, 1961, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Dyke Lansdale, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

Witness my hand and official seal.

BETH DONALD,

Notary Public in and for said County and State.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING.

I.

Introductory Statement.

The decision of this court, filed June 22, 1961 would result in an injustice to petitioner by depriving petitioner of rights afforded it under law. Moreover, the decision could serve to deprive other public utilities of the rights heretofore relied on by them in proceedings before the Public Utilities Commission of the State of California.

II.

This Court May Order Oral Argument on Rehearing.

Although no provision is made in the Rules on Appeal for oral argument on rehearing, the court may order further oral argument by the parties. (Mc-

politan Water District v. Adams, 19 Cal. 2d 463, 468 (1942); See 2 Stanbury, California Trial and Appellate Practice, p. 316, §1131.)

III.

The Court Should Grant a Rehearing on an Independent Judgment on the Law and the Facts.

The court will grant a rehearing if the decision sought to be reconsidered has done an injustice in a particular case, or if the principle involved is important and the decision will establish a precedent the correctness of which is serious doubted. (*In re Jessup,* 81 Cal. 471 (1898); See 3 Witkin, California Procedure, p. 2406, §203.) Moreover, the court will grant a petition for rehearing if the petition directs the court's attention to matters presented in the argument which may have been overlooked in the decision. (*San Francisco Bank v. Pacific Bank,* 89 Cal. 23, 25 (1891).)

IV.

The Decision Misstates the Facts Which Petitioner Represented It Would Submit in Evidence on Rehearing of the Matter Before the Commission.

As stated in petitioner's closing brief, "Petitioner's request for rehearing, filed March 31, 1960, stated that petitioner would submit evidence on its *actual* operating revenues and expense *prior and subsequent to* . . . the date of submission of the matter. . . ." (Emphasis added.) However, the decision states that the petitioner sought rehearing ". . . in order to hear evidence pertaining to the results of petitioner's operations occurring *subsequent to the close of the hearings* and before the issuance of the Commission's decision." (Emphasis added.)

Throughout the proceedings after issuance of the Commission's order, the petitioner sought to present evidence of its actual experience and operations, instead of mere estimates, which were all that were available at the time of the hearing.

In the past, this court has expressed its preference for evidence of actual experience in contrast to mere estimates or projections in matters involving rate hearings. (*Market St. Ry. Co. v. Railroad Commission*, 24 Cal. 2d 378, 401 (1944).) However, in the decision which is sought to be reconsidered, this court wholly ignored petitioner's oft-repeated statement that it proposed submitting evidence of *actual* revenues and expenses in place of the estimates on which the staff relied and which the decision states justified the rejection of the examiner's conclusion. Thus the decision reflects the court's misunderstanding of the contentions advanced by petitioner in support of its petition before this court, and the court should order rehearing of the matter.

V.

The Decision Fails to Establish a Standard of Reasonableness for, or Even to Require Reasonableness of the Commission in Acting on Applications for Rehearing.

Petitioner has never disputed the proposition that an administrative body has discretion to grant an application for rehearing, and that the discretion to be invoked is that of the administrative body and not the discretion of a court reviewing the action of the administrative body. (See *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 514-515, 88 L. Ed. 1420, 1428-1429 (1943).) However, if the discretion

of the administrative body in refusing to consider an application for rehearing is exercised in an arbitrary or unreasonable manner, so that the party seeking rehearing is denied a fair hearing, judicial relief available to the applicant whose rights have been prejudiced. If a rehearing ". . . is required by the essential demands of justice . . ." it will be ordered by a court having jurisdiction. (*Atchison, Topeka & Santa Fe Railway Co. v. United States*, 284 U. S. 248, 257, 61 L. Ed. 273 (1932).) In the case at bar, in concluding that there was no abuse of discretion, the decision does not comment on, or otherwise distinguish, *Petitions of New England Tel & Tel Co.*, 80 A. 2d 671, 116 Vermont 480 (1951), cited by petitioner in its closing brief. The factual situation presented in *Petitions of New England Tel & Tel Co., supra,* is almost identical to that presented in the case at bar, and, although the decision of the Vermont court is not controlling precedent in California, the failure of the decision to comment on or otherwise distinguish that case, by implication, rejects the prior ruling of this court in *Sumby v. Railroad Commission*, 191 Cal. 226, 231 (1923), in which it was stated that an applicant before the Public Utilities Commission may not be denied a hearing upon any question vital to a just and proper fixation of rates.

If rehearings before the Commission are to be solely at the whim and caprice of that administrative body, the decision of this court should state the rule, and applicants before the Commission will simply file applications for rehearing as a routine pleading in the nature of a condition precedent to relief in the courts.

VI.

The Decision of This Court Ignores the Unchallenged Statement of Petitioner That at the Time the Order Was Made, Its Provisions With Respect to Metering Were Unreasonable.

At no time during the proceedings has petitioner advanced the position that the prior orders of the Commission with respect to metering, with which Dyke Water Company had attempted to comply, were unreasonable or impossible of performance. Indeed, there is evidence in the record that petitioner was in the process of complying with the prior requirements as to metering during the hearings before the Commission. Moreover, in May, 1959, Dyke Lansdale, President of the petitioner, *did* testify that the metering, *at that time*, was feasible by means of long-term financing from the manufacturers or suppliers of the meters. Howeve , petitioner contends that when the Commission issued its order, on March 22, 1960, almost one year later, the order *at that time* was unreasonable and impossible of performance by petitioner. In the affidavit of Dyke Lansdale, filed in support of petitioner's application for rehearing before the respondent Commission, the petitioner *first* advised the Commission that the order would impose an impossible financial burden on the petitioner and jeopardize its service to the public. The affidavit specified in minute detail the basis for the conclusion offered by Dyke Lansdale, and it was never challenged. Despite the affidavit and application for rehearing the Commission felt free to disregard petitioner's verified representations.

It was the unreasonableness of the order *at the time it issued from the Commission* that petitioner advanced in support of its contention that a petition for writ of certiorari or review should issue from this court. Nevertheless the decision, after reciting the representations and acts of petitioner *prior* to the order of March 22, states that "At this late date, petitioner is hardly in a position to complain that the Commission's order of March 22, 1960, is impossible or unreasonable." The decision implies that petitioner is estopped to assert the unreasonableness of the order even though it may be unreasonable. Petitioner respectfully submits that the court in its decision has inadvertently adopted the patently punitive attitude of the respondent Commission toward petitioner in denying petitioner an opportunity to show that an order, not unreasonable at sometime in the past, was unreasonable at the time it issued from the Commission.

VII.

The Decision of the Court Wholly Fails to Meet the Contentions Advanced by Petitioner, That the Adoption of Conclusions Contrary to That of the Examiner, Constituted an Arbitrary Capricious Action by the Commission.

Petitioner, in its closing brief, cited and relied on a number of cases decided in the Federal Courts holding that where an administrative body rejects the recommendation of its own examiner, its action is presumptively arbitrary and capricious and will be reversed by the courts as an order unsupported by substantial evidence. (*Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 F. 2d 786, 789-790 (7th Cir. 1951); *In re United Corporation*, 249 F. 2d 168,

178 (3rd Cir. 1957); *A. E. Staley Mfg. Co. v. National Labor Relations Board*, 117 F. 2d 868, 878 (6th Cir., 1941).) The choice of a hearing before an examiner employed by the Commission was the choice of respondent, not that of the petitioner. Where an administrative body charged with a fact-finding function, concludes that it will utilize the services of an examiner having many if not all of the powers of a judicial officer, there is substantial authority for the proposition that great weight must be given to the examiner's conclusions. Petitioner's contention is wholly unanswered by the decision sought to be reconsidered. If, it is to be the law in California, that the conclusions of an examiner employed by the Commission to conduct rate hearings are to be denied ". . . the probative force they would have in the conduct of affairs outside a courtroom. . . .". (*Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 496, 71 S. Ct. 456, 469 (1951).) This court should render a decision to that effect. In such an event, applicants before the Public Utilities Commission will thereafter be well advised not to present their case to the examiner, whose conclusions need not be considered by the Commission, but to vigorously request a hearing before the Public Utilities Commission *en banc*.

VIII.

The Rates Ordered by the Commission Are Confiscatory and Constitute a Denial of Due Process of Law.

The decision relies on the Commission's finding that the emergency situation existing in December 1957, no longer existed so as to justify continuance of the in

terim rates at the time of the order in March 1960. The decision states that ". . . this finding was fully justified by the evidence of *estimates* that petitioner would earn a 16.08 per cent return in 1959." (Emphasis added.) However, petitioner's application for rehearing addressed to the Public Utilities Commission, which was denied without opinion, stressed that *actual* operating revenues and expenses would be presented to the Commission to establish that the *estimates* on which the Commission relied did not reflect the facts. (See *Market St. Ry. Co. v. Railroad Commission, supra*, 24 Cal. 2d 378, 401 (1944).)

As this court has stated in *Market St. Ry. Co. v. Railroad Commission, supra*, 24 Cal. 2d 378, 397 (1944), there is a presumption of the correctness of the findings and conclusion of the Commission. However, as the United States Supreme Court observed in *Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 602 (1942), "It is not the theory, but the impact of the rate order which counts." Petitioner respectfully submits that on reconsideration of this matter, after granting the petition for rehearing, this court will conclude that the total effect of the rate order is unjust and unreasonable to petitioner and reverse and annul the order of the respondent Commission as prayed for by petitioner.

Respectfully submitted,

FREDERICK L. SIMMONS for
RICHARD P. ROE,
H. O. VAN PETTEN,
FREDERICK L. SIMMONS,

Attorneys for Dyke Water Company, Petitioner.

EXHIBIT I.

Proposed Report of Examiner Stewart C. Warner.

Decision No. .....

Before the Public Utilities Commission of the State of California.

In the Matter of the Application of Dyke Water Company, a corporation, for authorization to increase its rates charged for water service. Application No. 39303 (Amended).

Investigation on the Commission's own motion into the rates, rules, regulations, contracts, operations and practices pertaining to and involving water main extensions of Dyke Water Company, a public utility water corporation. Case No. 5844.

The above-entitled application of Dyke Water Company, a corporation, was filed August 6, 1957, and amended on October 8, 1957. The applicant sought and seeks authority to increase its rates for general flat rate service from a basic amount of $3.00 per service connection per month to $4.50, a 50 percent increase, and to increase its general metered service rates from $2.50 per meter per month for the first 1,000 cubic feet or less to $3.75, with corresponding increases in the unit quantity rates, also representing an increase of 50 percent. The estimated increase in gross annual revenues at the proposed rates is approximately $375,000.

A public hearing on the First Amendment to the application was held before Commissioner Rex Hardy and Examiner Stewart C. Warner on November 1, 1957, at Santa Ana. The purpose of said hearing was to establish a record as to whether or not the applicant

should receive interim rate relief. Based upon such record and by Decision No. 56003, dated December 17, 1957, the applicant was authorized to increase its monthly residential flat rate from $3.00 to $3.75, with corresponding increases in the rates and charges in applicant's general metered service schedule. Said decision found the existence of exigent circumstances, primarily a financial emergency, which justified the authorized increases in rates and charges. Said interim rates are those presently in effect.

By an order dated October 30, 1956, the above-entitled investigation was instituted.

Public hearings on both of the above matters were held on a consolidated record before Commissioner Hardy and Examiner Warner on December 26, 1957; before Commissioner Matthew J. Dooley and Examiner Warner on January 14 and 15, 1959, and before Examiner Warner on March 18, April 17, 20, 21, 22, 23, 24, 27, 28 and 30, and May 1, 1959 at Santa Ana, and May 5, 6, 7 and 8, 1959, in Los Angeles. Orange County Water District appeared as an interested party to urge that applicant be required to install meters on all customers' premises for water conservation purposes; Pacific Water Co. appeared as an interested party and as a protestant insofar as the proposed increase in rates for water service might affect those areas shown on the map, Exhibit No. 42, in green and yellow, and red crosshatching where the applicant was furnishing water service outside its certificated area and within the certificated area of Pacific; one customer of the applicant appeared to report the results of a personal survey which she had made of applicant's customers in Midway City regarding their views on flat

rate service versus general metered service: 9 letters from customers were received and read into the record by the presiding officer at hearings when so received; and Exhibit No. 49 was introduced by the applicant as an affidavit that 18,500 post cards had been mailed by the applicant on March 23 and 24, 1959, to its customers seeking their views on the questions of (1) whether they wanted meters installed at their houses, and (2) whether they would pay 75 cents more a month "to put your water company on a paying basis and sound financial position to preserve the low flat rate basis of water distribution which has been so successful here?"

On May 5, 1959, the applicant filed a Petition for Proposed Report pursuant to Rule 69 of the Commission's Rules of Procedure; on May 8, 1959, applicant's counsel moved for a supplemental hearing to determine how the Commission arrives at its decisions; on May 12, 1959, the Commission granted said Petition and directed the presiding examiner to prepare and file a Proposed Report, denied said motion on grounds that it was improper, and concluded that, having granted the Petition, oral argument before the Commission *en banc* would be unnecessary and canceled such argument set for May 19, 1959. The instant Report has been prepared and filed in accordance with such directions pursuant to the Commission's Rule 70.

Of the total of 19 days or partial days of hearing, the applicant and the Commission staff consumed one full day for the submission of evidence on the First Amendment to the application; a partial day was consumed in December 1957 by the applicant for the requesting of a continuance of the matters; following

another request by applicant for a continuance, the better part of 2 full days was consumed by the staff and interested parties in January 1959 for the submission of their direct testimony; another partial day was consumed by the applicant for the requesting of a continuance in March 1959; 3½ days were consumed by the applicant to present its direct testimony starting in April 1959; 7 days were consumed by the applicant in cross-examination; approximately 2 days were consumed by the staff and interested parties in cross-examination; and in the balance of the hearing days time was consumed in redirect and rebuttal testimony submitted by all parties to the proceedings. The evidence comprises 2,070 pages of transcript[1] and contains 64 exhibits (some exhibits were multi-numbered, and one exhibit was marked for identification but not received in evidence). The matters have been submitted and are now ready for decision.

General Information.

Applicant was incorporated on March 5, 1951.

The record shows that the applicant was granted a certificate of public convenience and necessity by Decision No. 46758, dated February 13, 1952, in Application No. 32634, to serve approximately 13 customers in Tract No. 1345 in unincorporated territory of southwestern Orange County in the vicinity of what is now the City of Garden Grove. By said decision rates for water service were fixed and authority was granted to issue stock. By some 40 subsequent decisions applicant's certificated area was greatly expanded and particularly delineated. Complaints against the applicant

[1]Pages 683 to 719, inclusive, were not used due to volume of transcript being transcribed out of order.

by other public utility water companies and agencies in this portion of Orange County were adjudicated, and by one decision the applicant was granted authority to issue a $500,000 note. Between December 31, 1952, and December 31, 1957, the number of applicant's customers increased from 13 to 19,330 (the record shows that as of May 1959 the number of applicant's customers approximated 22,000); its total operating revenues increased from $623 for the year 1952 to $925,105 for the year 1958, and its gross plant increased from $50,090 as of December 31, 1952, to $4,474,300 as of December 31, 1958, each as reported to the Commission in its annual report. Of such latter amount of gross plant, advances for construction amounted to $2,621,851, or 58.6 percent, as of said date.

Applicant's principal place of business and headquarters are located at 11065 Penn Avenue, Garden Grove, and, as of December 31, 1957, applicant had 26 employees.

The record shows that applicant's officers, directors and sole stockholders have been and are members of the Lansdale family, either Dyke Lansdale or W. M. Lansdale as president, L. D. Lansdale as vice president, and Arlyne Lansdale, secretary-treasurer and attorney. The record shows that authorized shares of capital stock consist solely of 250 shares of common stock having a par value of $100 a share, and that outstanding shares at December 31, 1957, numbered 80 and were issued to A. Lansdale, L. D. Lansdale and W. M. Lansdale. The record shows that associated companies were formed and controlled by the Lansdale family to acquire, own, and transfer properties both for the applicant public utility water corporation, for water system

operation purposes, and for subdivision purposes. Two of such companies were Dyman Corporation and Judy, Inc. Other water system properties used by the applicant have been acquired and owned by members of the Lansdale family, and some major properties, including wells, well sites, an office building site and building, and two potential reservoir sites, are still owned by and are maintained in the name of individual members of the Lansdale family and Judy, Inc., although in some instances such ownership has been recorded on the applicant's books in the name of the applicant.

The record shows that the applicant and its proprietors and managers since the year 1951 have vigorously solicited, supported and participated in the spectacular subdivision growth which has taken place, and to some extent is still taking place, in this part of Orange County which generally lies immediately south of the now completed Santa Ana Freeway, west of the City of Santa Ana, north of the Pacific Ocean, and east of the San Gabriel River. The record shows that applicant has made in excess of 300 contracts for water system installations in at least that many subdivisions; that in making such contracts the applicant's principals encouraged subdividers to enter the area, arranged bank loans and other types of financing to the extent of having personally endorsed subdividers' bonds and notes, provided engineering maps and services for water system installations and sewer and street construction, laid out lots in subdivisions, arranged for the placing in escrow of subdivided properties, saw to it

that such escrows were completed, advised subdividers on the obtaining of local permits and licenses, advised subdividers about how to obtain FRA and VA financing, provided telephone service for subdividers and office building space for their sub-dividing activities, and issued booklets and maps promoting and explaining the area and areas proposed to be subdivided, and engaged in many other promotional activities not only private, as individuals, but corporate and civic. In return for, and in connection with, such services the applicant enjoyed an ever-expanding water system and in most cases secured from subdividers line-to-line easements and rights of way for the installation of water systems, together with the water rights underlying subdivided properties. In most cases the services of applicant's principals, acting not necessarily as public utility corporation proprietors and managers, were the sole consideration for the rights acquired by the applicant or its principals. Except in few instances were any costs associated with the acquisition of such rights recorded on applicant's books of account. Sometimes other valuable water system properties such as wells and well sites were acquired by the applicant or its principals in exchange for their services without cost, as such, to the applicant. Water systems were installed by applicant's own construction crews in some cases, in others under contract by Dyman Corporation, or by subdividers through sub-contractors. The costs of all such installations were supported by invoices and vouchers entered on applicant's books of account.

Accounting Procedures.

By Decision No. 53858, dated October 1, 1956, in Applications Nos. 37097 and 37161, the Commission found as a fact that the applicant's bookkeeping and accounting practices were not then kept in accordance with the Uniform System of Accounts for Water Utilities, and applicant has admitted freely in the instant proceedings that its books and records are not reliable, although the record shows that since 1956 the applicant has endeavored, and with substantial success, to bring its books of account up to prescribed accounting standards; that a work order system has been instituted; and that, at least currently, the books of account are now being kept in a prescribed manner. Despite such improvement it is the applicant's position that its utility plant records do not reflect the cost of its utility plant. Since October 31, 1957, the applicant's now president has been engaged to a great extent in making a physical inventory and appraisal of utility plant, and the results of such appraisal are set forth in Exhibit No. 53 in the total amount, as of December 31, 1958, of $12,298,589.98, which is contrasted to the book amount reported by the applicant to the Commission in its annual report for the year ending December 31, 1958, heretofore noted. Said appraisal was made on the form for land, wells, tanks, and connections shown on Exhibits Nos. 50 and 50-A which include, in most instances, land at $.833 per square foot regardless of the date on, or the conditions under which, the land was acquired by the applicant, and they include substantial

items of well and tank equipment costs which, although in most instances are supported by invoices, do not in every instance reflect the historical cost of the entire plant installation and which, in other instances, reflect costs of material improperly associated with such installations such as transite pipe, fittings, and labor for connections. The applicant's appraisal of its mains, services, meters, and real estate is set forth in Exhibit No. 51, and the record shows that such appraisal is based on average judgment prices which are in contrast to actual invoice prices which were in effect during the years involved. Exhibit No. 51-A is an appraisal by applicant of its structures and improvements, office furniture and equipment, transportation equipment, tools, shop and garage equipment and communication equipment, and fire hydrants. The appraised value of such equipment is included in the appraisal summary, Exhibit No. 53, *supra*.

Exhibit No. 57-A is a tentative annual report for 1958, dated May 11, 1959, based on engineers' appraisal valuations of utility plant and other assets. Total utility plant less reserves shown therein amounts to the figures of $12,208,589.08, heretofore noted as shown in Exhibit No. 53, *supra*.

Earnings.

Exhibit No. 49 is a report on the results of applicant's operations for the year 1957 recorded and adjusted, and for the years 1958 and 1959 estimated, submitted by Commission staff engineering and accounting witnesses. The earnings data for the year 1957 record-

ed and for the year 1959 estimated, based on present operations at prior rates, interim rates and the proposed rates, and for a fully metered system as shown in said exhibit, together with the earnings data for the year 1958 recorded as shown in Exhibit No. 57, are summarized as follows:

SUMMARY OF EARNINGS

Item	Year 1957 Recorded Per PUC Ex. 19	Year 1958 Recorded Per Co. Ex. 57	Year 1959 Estimated Per PUC Ex. 19			
			Present Operations			Fully
			Prior Rates	Interim Rates	Proposed Rates	Metere System
OPERATING REVENUES	$657,025	$925,105	$ 751,000	$ 938,700	$1,126,200	$ 938,70
OPERATING EXPENSES						
Oper. & Maint.	219,575	237,890	249,800	249,800	249,800	262,90
Admin. & Gen.	135,020	172,860	72,200	72,200	72,200	72,70
Depreciation	122,507	129,847	102,500	102,500	102,500	134,30
Taxes—Other	120,102	110,025	39,800	39,800	39,800	49,30
Taxes—Income	13,220	91,002	106,100	207,300	308,400	149,50
Total Expenses	610,424	741,624	570,400	671,600	772,700	668,70
NET REVENUE	46,601	183,481	180,600	267,100	353,500	270,00
RATE BASE	.....	.....	1,123,000	1,123,000	1,123,000	2,269,00
RATE OF RETURN	.....	.....	16.08%	23.78%	31.48%	11.90%

The staff engineers estimated operating revenues and expenses based on what they testified to be their opinion of the reasonableness thereof.

The staff included in its estimated depreciated rate base the historical cost of the utility plant in service, determined by a staff accountant. Such latter determination was made from applicant's books of account as of December 31, 1957, after his having adjusted said books of account to reflect the elimination, as proper, of properties contributed by the Lansdale family, or properties considered nonoperative, and of a distribution system in Tract No. 3029 seized by the City of

Anaheim, and to reflect the addition of properties obtained from Dyman Corporation, of other work in progress reclassified, and of general and administrative expense capitalized. To such accounting adjustments, all as set forth in Chapter 4 of Exhibit No. 19 and summarized in Table 4-B thereof, a staff engineer made further adjustments for the addition of certain wells and well sites and for the elimination of utility plant in Yorba Linda Tract No. 3182 for rate-making purposes. Except for such latter adjustment, the record shows that applicant's plant in other tracts in which applicant is serving in violation of Commission decisions has not been removed from the rate base because records to permit segregation of revenues and expenses associated with these tracts are not available. Operating and maintenance expense accounts were adjusted by another staff engineer to harmonize with adjustments to utility plant in service included in the rate base. Advances for construction in the amount of $2,631,000 were deducted from utility plant in service for the year 1959 estimated, on the basis that until such advances are refunded the applicant is actually using property the cost of which has been advanced by consumers.

Financial Condition.

Exhibit No. 57, *supra*, indicates the company's balance sheet financial position as of December 31, 1958. Such financial condition is summarized and compared with the applicant's financial position as of August 31, 1957, which was prepared from Exhibit No. 2 and which was set forth in Decision No. 56003, as follows:

Assets	*Financial Condition as of:*	
	August 31, 1957 Per Co. Ex. 2	December 31, 19 Per Co. Ex. 57
Investment—		
Utility plant, less depreciation	$3,742,899	$4,057,503
Deduct—		
Advances for construction	2,618,532	2,734,530
Contributions for construction	76,012	102,434
Net utility plant	1,048,355	1,220,539
Nonoperative property	72,138	68,575
Current assets		
Cash	135	(74,210)
Special deposits	.....	9,051
Working funds	.....	250
Temporary cash investments	.....	12,459
Accounts receivable	6,523	9,769
Receivables from associated companies	.....	197,276
Materials and supplies	16,973	25,857
Prepayments	25,881	10,076
Total current assets	49,512	190,528
Total	$1,170,005	$1,479,642
Liabilities and Capital		
Long-term debt	62,313	376,078
Current liabilities	623,208	307,776
Capital		
Common stock	8,000	8,000
Capital surplus	348,063	555,811
Retained earnings	128,421	231,977
Total capital	484,484	795,788
Total	$1,170,005	$1,479,642

*Overdraft (red figure)

Analysis of applicant's financial condition as hereinbefore shown indicates that whereas applicant's total current assets have increased and its total current liabilities have decreased, the adverse ratio of current assets to current liabilities still represents an unfavorable financial position as of December 31, 1958. The bank overdraft of $74,210 is compared with an amount shown on Exhibit No. 2 of $44,532 as a current liability as of August 31, 1957. No explanation is given in Exhibit No. 57 of the item Receivables from Associated Companies amounting to $197,276, although it is noted from the record herein that the applicant's bank account, while receiving deposits in applicant's name, is kept in the name of Dyman Corporation which, as heretofore noted, is associated with applicant.

It is further noted that applicant's long-term debt has increased, but no application for the incurring of any indebtedness payable at periods of more than 12 months affer the date thereof has either been filed with or granted by the Commission pursuant to the provisions of Section 830 of the Public Utilities Code.

As to the applicant's recorded operating expenses as shown in Exhibit No. 57, *supra*, and as set forth under the subsection "Earnings" herein, it is noted that applicant charged Account No. 791, Administrative and General Salaries, in the amount of $35,000 for W. M. Lansdale, $28,000 for L. D. Lansdale, $22,000 for A. Lansdale, and $21,400 for Dyke Lansdale, for a total amount of $106,400, during 1958. The testimony of applicant's president, Dyke Lansdale, was that at no time has he ever received any dollar compensation or salary from the applicant, and that during the period November 1, 1957, to some time in March 1959, he was not an officer of applicant and was not employed by

applicant. The record herein does not disclose whether such charges to Account No. 791 during the year 1958 reflect actual cash disbursements to the said individuals or bookkeeping entries of another type. They are not shown as current and accrued liabilities nor in any other discernible group of accounts on the balance sheet dated December 31, 1958, contained in Exhibit No. 57 unless such charges were credited to surplus, which likewise is not discernible in said Exhibit No. 57. The record shows, however, that members of the Lansdale family spent much time on the operation and management of applicant's affairs and water system during the year 1958, particularly Mrs. Arlyne Lansdale who devoted long hours 7 days a week, and Dyke Lansdale who conducted the heretofore-mentioned appraisal, although apparently not formally employed by applicant in the so conducting. Further, analysis of Exhibit No. 57 does not reveal the basis of the total charge of $37,571 to Account No. 782, Demonstrating and Selling Expenses, although a staff engineer testified that the amount of $38,300 of Sales Expenses charged to Account No. 781, Supervision, during 1957, since it included many items of travel expense to Sacramento and items not properly chargeable to utility operating expenses to be borne by the applicant's customers through its rates for water service, was unreasonable for rate-making purposes.

Meters.

Exhibits Nos. 20 through 41 constitute the documentary evidence submitted by Orange County Water District to urge that the Commission continue to require the installation of meters on all of applicant's customers' water service connections. The verbal testimony of the secretary-manager of the District supported and

implemented the documentary evidence. The record shows that applicant is the only large water system, either municipally or privately owned, in Orange County which furnishes the bulk of its water service on a flat-rate basis; that the District is authorized to and does purchase and import Metropolitan Water District untreated surplus water to replenish the ground water supplies in the County; that the price paid for such imported water is $12 per acre-foot; that each owner of a water-producing well is taxed at the rate of $3.90 per acre-foot of water produced by a well; that two-thirds of the water used within the Orange County Water District basin area is used for irrigation purposes; that the balance is used for municipal (fire protection, etc.), industrial, and domestic purposes; that of the total of 159,867.6 acre-feet of water produced from the basin in the period of July 1, 1957, to June 30, 1958, the Dyke Water Company reported production of 16,495.1 acre-feet which is in excess of 10 percent of the total amount produced.

A staff engineer testified that, based on his studies of five privately owned public utility water companies operating in Southern California which had changed from flat rate to metered service, he anticipated that if the present level of interim flat rates and general metered service rates were continued and the applicant's water system were entirely metered, the per customer consumption would be reduced by between 25 and 40 percent. He further testified that if the rates were reduced to their prior level, the per customer consumption would be reduced by about 16 percent.

Main Extension Practices.

Exhibit No. 44, submitted by a staff engineer, is a report on an investigation of applicant's main extension

practices. Said exhibit shows that applicant has entered into at least fifty-one main extension agreements which specify a refund obligation in excess of that provided for by its main extension rule; that applicant had entered into over 300 agreements relating to advances for construction for water systems between February 1952 and June 30, 1958; that the advances under such agreements totalled $3,203,000, of which the amount of $2,285,000 represents agreements calling for refunding based on 35 percent of the gross annual revenues up to ten years, $788,000 on a refund provision of 22 percent of the annual revenues up to twenty years, $99,000 on a refund of $1.25 per customer per month, and $31,000 on refund in full and on demand three years after the completion of the construction.

The record shows the following recorded and estimated refunds for the years 1952 through 1964:

Year	*Amount*
1952	$ —
1953	1,810
1954	17,283
1955	36,778
1956	108,362
1957	190,283
1958 (thru Sept.)	229,496
1958 (Estd. Total)	300,000
1959 (Estd.)	360,000
1960 (")	390,000
1961 (")	410,000

The record shows that applicant's refunds now constitute about one-fourth of its gross revenues at the interim rates.

Section B, Main Extension Deviations of Chapter 3 of Exhibit No. 44 summarizes and sets forth examples of deviations in main extension agreements for the period from February 1952 to August 1955, from the period following the filing of applicant's present main extension rule effective August 15, 1955, and certain specific deviations as determined by a staff investigation.

Metropolitan Water District Water.

The record shows that in the years 1954 and 1955 applicant was negotiating with the Orange County Municipal Water District, an agency of the Metropolitan Water District, for a connection therewith to import and utilize MWD water into applicant's water system. After making a deposit of $19,000 toward the initial cost of a connection, and after having had a tentative contract submitted to it, applicant found said contract to be unsatisfactory to it, negotiations ceased, and the deposit was returned by the District to applicant. Since that time no negotiations have taken place. Applicant's president testified that applicant had no intention of renewing negotiations or efforts to secure MWD water. His testimony indicates that applicant believes that its sources of water supply from its 87 presently operating wells and potentially operative 28 additional wells are more than adequate to meet all future water demands. His testimony indicates that, because of the lack of need for MWD water, title to two reservoir sites, one at Brookhurst and Katella, the so-called Anaheim site, and the other in Westminster, has not been transferred from the Lansdale family to the applicant and that their future disposition is unknown. The record shows in this regard, however, that a $70,000

forfeitable bond has been put up by the applicant to guarantee the completion of the construction of a reservoir at the Anaheim site. The probable disposition of said bond is unknown.

A staff engineer testified that the 87 wells now being operated by applicant would produce sufficient quantities of water throughout applicant's distribution system to meet the minimum water supply requirements of General Order No. 103 as shown in Chart 2 of said order. He testified further, however, that applicant's water system could be more efficiently operated through the utilization of large storage facilities, preferably elevated tanks which would to a great extent eliminate the frequent and intermittent starting and stopping of applicant's pumps at its wells which now pump directly into hydropneumatic pressure tanks and thence into the distribution system. The present operation is a "closed system" which is subject to some volatility caused by variations in customers' demands. The record shows that neither of applicant's reservoir sites would be economically operable as large-sized, below-ground surface storage facilities for the reason that they would require excavation, cement, Gunite, or other type lining, and would require the installation of pumps to pump water in and out thereof.

Section A—Service, of Chapter 15 of Exhibit No. 19, sets forth the results of field investigations of applicant's operations, service, and facilities made by a staff engineer during the years 1957 and 1958.

Staff Recommendations.

A staff engineering witness recommended in Chapter 16 of Exhibit No. 19 the following changes in appli-

cant's operations to improve service and increase efficiencies:

1. Conduct an annual customer premises survey for all flat rate customers and render bills in accordance with the findings of such survey.
2. Review meter reading and billing practices for all metered accounts so that time required for manual reading and billing operations is reduced to a minimum.
3. Review work load distribution for billing and collecting flat rate accounts to obtain efficient utilization of personnel time.
4. Prepare a plan for pumping plant operation which follows accepted engineering principles and will result in improved minimum service pressure and continuity of adequate supply.
5. Coordinate pumping plant operations with the general operations of Orange County Water District and the ground water replenishment program for Orange County.
6. Install continuous pressure recorders and operate such pressure recorders in accordance with the requirements of General Order No. 103.
7. Perform efficiency tests for its pumping plants on an annual basis.

Said witness also recommended that the company be instructed to accrue depreciation monthly using the straight-line remaining life method based on the annual reviews required by ordering Paragraph 4 of Decision No. 53858.

The record shows that applicant had already, as of January 1959, taken steps to place into effect and carry out many of these staff recommendations.

Paragraphs 4 and 5 of Section B of Chapter 4 of Exhibit No. 44 set forth the recommendations of a staff engineer regarding the disposition of recorded contributions as classified and itemized in Appendix C of said exhibit. Said contributions are classified as follows:

(a) *Company to Return Contributions*—totalling $39,946.77.

(b) *Company to Execute Refunding Agreements*—wherein what had been recorded as contributions are to be made advances to be refunded in accordance with applicant's main extension rule then in effect, totalling $22,934.60.

(c) *Company to Provide Information*—to establish that each contribution was voluntary and not in violation of the company's main extension rule then in effect, totalling $26,831.90.

(d) *Retain in Contributions Account*—items in this classification are known to be contributions in fact, totalling $1,189.70.

This witness further recommended that applicant be directed to charge for all water used by its customers for construction in accordance with its filed tariff Schedule 9-F.

Rates.

As noted heretofore, applicant's presently filed Schedules No. 1, General Metered Service and No. 2, General Flat Rate Service were made effective on January 1, 1958, on an interim basis, by Decision No. 56003, supra.

The record shows that in order to produce gross operating revenues under a fully metered system for the year 1959 estimated of $938,700 as shown heretofore

under "Earnings," the metered rates would have to be substantially below the present metered rates since the monthly bill with present metered rates and an estimated 2,090 cubic feet per month usage would be $0.39, as compared with the interim flat rate of $3.75 per month. A staff engineer calculated that general metered service rates of $2.00 per meter per month for the first 1,000 cubic feet or less of usage; 15 cents per 100 cubic feet for the next 1,000 cubic feet; and 10 cents per 100 cubic feet for all usage over 2,000 cubic feet per meter per month, would approximately produce the said $938,700 of gross operating revenue estimated for the year 1959 at present operations under the interim rates. The monthly charge for consumption of 2900 feet, assuming that to be an average usage, would be $4.20.

Under the prior rates for general metered service which were established in February, 1952, the charge for a consumption of 2,000 cubic feet was $4.00; under the interim rates effective in January, 1958, such charge is $5.15; under the rates proposed in the application such charge would be $5.98; and under the rates authorized hereinafter such charge will be $3.50.

Applicant has not sought nor does not seek authority herein to increase its presently effective Schedules No. 3-M, Measured Irrigation Service; No. 4, Private Fire Protection Service; No. 7-F, School Flat Rate Service; No. 9-F, Construction and Other Temporary Flat Rate Service; and No. 10, Company Employees Service.

Pacific Water Co. Evidence.

Pacific Water Co., as an interested party and protestant, submitted documentary evidence of a map, Exhibit

No. 42, and a list of tracts served by Dyke Water Company in territory certificated to Pacific as Exhibit No. 43. A witness for Pacific testified that Pacific was losing gross annual revenues of $113,600 from water service by Dyke Water Company to customers which Pacific was certificated to serve. No segregation of related expenses of fixed capital was entered on the record herein for the 37 tracts and 2,506 lots shown on Exhibit No. 43.

Recommended Findings and Conclusions.

Based on the record and the evidence herein submitted, it is recommended by the examiner, pursuant to Rule 70 of the Commission's Rules of Procedure, that the following be found as a fact and concluded:

1. (a) That applicant's accounting and bookkeeping practices have greatly improved since October 1, 1956, on which date the Commission ordered the applicant to take steps to effect such improvement, but that prior to such date such practices were not in accordance with prescribed accounting and bookkeeping standards.

   (b) That applicant has installed a work order system.

   (c) That applicant's books of account are now being kept in accordance with the Uniform System of Accounts for Water Utilities.

   (d) That the balance sheet, set forth on Table 4-B of Exhibit No. 19 as adjusted by the Commission staff accounting witness thereon, shows the historical cost of applicant's utility plant less depreciation and properly shows applicant's financial condition as of December 31, 1957.

(e) That Dyke Water Company should be directed to adjust its books of account to conform to the balance sheet as of December 31, 1957, after adjustments as shown on Table 4-B of Exhibit No. 19.

2. (a) That applicant's appraisal of its properties, submitted as Exhibits Nos. 50, 50-A, 51, 51-A, 53 and 57-A, do not reflect historical cost either undepreciated or depreciated, but do represent the applicant's judgment of what its properties are worth.

(b) That applicant's appraisal of its properties, in the amount of $12,557,693.59, is unreasonable for rate-making purposes.

3. (a) That the estimates of operating revenues, expenses, and rate base, submitted by the Commission staff for the year 1959, are reasonable but should not be adopted for rate-making purposes in this proceeding because of applicant's financial condition hereinafter found to exist.

(b) That if such rate of return components were adopted and a so-called orthodox determination of a level of rates for water service were made herein, applicant's rate of return for the year 1959 estimated based on prior, interim, and proposed rates based on present operations and based on the same gross revenues which would be produced by the interim rates on a fully metered system, would be excessive rate of return, in major part, results from applicant's unlimited use of its main extension rule to obtain the amount or $2,631,000 of advances for construction deducted from utility plant in service in the rate base determination for the year 1959

estimated. Such excessive rate of return, also in major part, results from differences between the amounts of operating expenses as recorded by applicant on its books and the amounts of operating expenses herein found to be reasonable.

(c) That a so-called orthodox determination of rate levels based on the rate of return concept is unreasonable for this proceeding, in that such level of rates would be required to be set at an unreasonable low level.

4. (a) That the present financial condition of the applicant continues to jeopardize the ability of the applicant to furnish reasonable service to its customers in as great degree, if not greater, than was found by Decision No. 56003, *supra*, and that the same or more exigent circumstances exist as to said financial condition.

(b) That the application should be granted in part and denied in part.

(c) That the public interest continues to require that applicant's customers receive reasonable service, and that in order to furnish such service Dyke Water Company's interim flat rates established by Decision No. 56003 should be made permanent, except as hereinafter noted, and until otherwise authorized to be changed by the Commission.

5. That Dyke Water Company produces a significant amount of water from its wells in the territory overlying the Orange County Water District basin for consumption by its customers.

6. That the public interest requires that, in order to conserve ground water supplies of the Orange

County Water District basin, the Commission's order in Paragraph 1. (e) of Decision No. 53858, ordering applicant to institute a program of metering of its water system, be reaffirmed but implemented as follows:

(a) That Dyke Water Company, a corporation, should be authorized to file the schedule of rates for flat rate service as set forth in its application herein and as attached thereto as Exhibit "C-1."

(b) That applicant should immediately commence to install meters on all of its customers' water service connections.

(c) That applicant should establish a fund to which should be added bimonthly $1.50 of the authorized $4.50 flat rate per service connection per month, and a proportional amount of the authorized increases in flat rates for other types of flat rate services, and that such $1.50 and other amounts should be disbursed from such fund for the purchase and installations of meters only.

(d) That the funded monies herein ordered to be established should be placed in a special account with a local bank in the name of Dyke Water Company, and that a copy of a bimonthly statement of the deposits to, withdrawals from, and balances in such fund, together with a statement of the number of meters installed and their costs as related to the withdrawals from such fund, certified by a responsible officer of applicant and such bank, shall be submitted to the Commission in writing within five days following the end of each two months, until

the metering of applicant's water system has been completed. Upon such completion, applicant should certify to the Commission that fact. The deposits to such fund shall not be restricted to monies received from customers in payment of their monthly or bimonthly flat rate service bills, but may include monies deposited by the applicant for the additional financing of the metering program, if necessary.

(e) That Dyke Water Company, a corporation, should be directed to file a new schedule of general metered service rates which will produce approximately $938,700 of gross operating revenues for the year 1959 on a fully metered system basis, which amount should be the same approximate gross amount which would be produced by the interim flat rates authorized by Decision No. 50003.

7. That the increases in rates and charges authorized hereinafter are just and reasonable and that applicant's present rates and charges insofar as they differ from those authorized hereinafter are unjust and unreasonable.

8. (a) That applicant's sources of water supply from its own wells and wells available to it which are now operative, and other wells which may be made operative, and from pumping plants associated with all of such wells, are adequate and ample to meet applicant's customers' water service demands within the reasonably foreseeable future.

(b) That due to applicant's financial condition herein found to exist, the public interest re-

quires that Paragraph 1. (i) of Decision No. 53858, which said paragraph ordered applicant to report to the Commission in writing its progress in financing and carrying out its plan for the importation and utilization of Metropolitan Water District water, should be rescinded.

9. (a) That the staff recommendations contained in Chapter 16 of Exhibit No. 19 are reasonable and that the applicant should continue to carry out and put into effect the recommendations contained in said Exhibit No. 19.

(b) That the staff recommendations contained in Chapter 4 of Exhibit No. 44 are reasonable, and that the applicant should be directed to immediately dispose of its recorded contributions pursuant to the classification and itemization in Appendix C of said exhibit in accordance with said staff recommendations.

10. That except as hereinbefore provided, the application should be denied.

11. That until such time as the applicant shall have certified to and satisfied the Commission that it has carried out the staff recommendations in Chapter 4 of Exhibit No. 44, the instant Order Instituting an Investigation of Water Main Extensions should not be dismissed.

12. That the record in these proceedings does not support a finding with respect to the position and contentions of Pacific Water Co., interested party and protestant.

13. That the end result of the order entered hereinafter is in the public interest in that it provides levels of flat rates and meter rates which

are not excessive nor incomparable to rates for the provisions and furnishing of water service in the immediately surrounding area of Orange County; in that the financial condition of the applicant is assisted toward improvement; in that conservation of ground water supplies in the Orange County Water District basin is promoted; and in that aplicant's operations will be more efficient, service conidtions will be bettered, and contributions will be properly disposed of; and that such end result is reasonable based on the evidence in these proceedings and findings and conclusions with respect thereto.

Recommended Order.

Application as above entitled, as amended, having been filed, and an Investigation on the Commission's Own Motion of the main extension practices of Dyke Water Company having been instituted, public hearings having been held, the matters having been submitted and now being ready for decision, it is recommended by the examiner, pursuant to Rule 70 of the Commission's Rules of Procedure, that the following order be entered:

1. That Dyke Water Company, a corporation, be and it is directed to adjust its books of account to conform to the balance sheet as of December 31, 1957, after adjustments, as shown on Table 4-B of Exhibit No. 19.
2. That the application of Dyke Water Company, a corporation, be granted in part and denied in part.
3. That the interim flat rates established by Decision No. 50003 be and they are made perma-

nent, except as hereinafter noted and until otherwise authorized to be changed by the Commission.

4. That Paragraph 1. (e) of Decision No. 53858, which said paragraph ordered applicant to institute a program of metering of its water system, be reaffirmed but implemented as follows:

(a) That Dyke Water Company, a corporation, be and it is authorized to file in quadruplicate with the Commission after the effective date of this order, in conformance with this Commission's General Order No. 96, the schedule of rates for flat rate service as set forth in its application herein and as attached thereto as Exhibit "C-1," and as shown in Appendix A attached hereto as Schedule No. 2, and upon not less than five days' notice to the Commission and to the public to make such rates effective for water service rendered on and after September 1, 1959.

(b) That applicant shall immediately commence to install meters on all of its customers' water service connections.

(c) That applicant shall establish a fund to which shall be added bimonthly $1.50 of the authorized $4.50 flat rate per service connection per month, and a proportional amount of the authorized increases in flat rates for other types of flat rate services, and that such $1.50 and other amounts shall be disbursed from such fund for the purchase and installations of meters only.

(d) That the funded monies herein ordered to be established shall be placed in a special account with a local bank in the name of Dyke Water Company, and that a copy of a bimonthly statement of the deposits to, withdrawals from, and balances in such fund, together with a statement of the number of meters installed and their cost as related to the withdrawals from such fund, certified by a responsible officer of applicant and such bank, shall be submitted to the Commission in writing within five days following the end of each two-month period until the metering of applicant's water system has been completed. Upon such completion applicant shall certify to the Commission that fact. The deposits to such fund shall not be restricted to the monies received from customers in payment of their monthly or bimonthly flat rate service bills but may include monies deposited by the applicant for the additional financing of the metering program, if necessary.

(e) That Dyke Water Company, a corporation, be and it is directed to file in quadruplicate with the Commission after the effective date of this order, in conformity with the Commission's General Order No. 96, the schedule of general metered service rates as shown in Schedule No. 1 in Appendix A attached hereto, and upon not less than five days' notice to the Commission and to the public to make such rates effective for water service rendered on and after September 1, 1959.

5. That ordering Paragraph 1. (i) of Decision No. 53858, which said paragraph ordered applicant to report to the Commission in writing its progress in financing and carrying out its plan for the importation and utilization of Metropolitan Water District water be, and it is rescinded.

6. That except as hereinbefore provided, the application be and it is denied.

7. That applicant be and it is directed to continue to carry out and place into effect the staff recommendations contained in Chapter 10 of Exhibit No. 19.

8. (a) That applicant be and it is directed to immediately dispose of its recorded contributions pursuant to the classification and itemization in Appendix C of Exhibit No. 44 in accordance with the staff recommendations contained in Chapter 4 of said exhibit.

(b) That applicant shall within ninety days after the effective date of the order herein, certify to the Commission in writing, over the signature of a responsible officer, that it has complied herewith.

(c) That until such certification shall have been submitted to and received by the Commission, the instant Order Instituting an Investigation shall not be dismissed, but that, upon receipt of certification and the Commission being satisfied that applicant has fully complied with paragraphs 8 (a) and (b), the Commission may issue a supplemental order dismissing Case No. 5841.

9. That the effective date of this order shall be twenty days after its date.

Stewart C. Warner
Examiner

May 28, 1959
Los Angeles, California

Schedule No. 1

GENERAL METERED SERVICE

APPLICABILITY

Applicable to all metered water service.

TERRITORY

Portions of the incorporated cities of Anaheim, Barber City, Garden Grove, Huntington Beach, Midway City, Santa Ana, Stanton, Westminster, and adjacent territory, Orange County.

RATES

	Per Meter Per Month
Quantity Rates:	
First 1,000 cu. ft. or less	$2.00
Next 1,000 cu. ft., per 100 cu. ft.	.15
Over 2,000 cu. ft., per 100 cu. ft.	.10
Minimum Charge:	
For 5/8 x 3/4-inch meter	$2.00
For 3/4-inch meter	2.30
For 1-inch meter	2.50
For 1½-inch meter	3.00
For 2-inch meter	3.75
For 3-inch meter	6.50
For 4-inch meter	9.25

The Minimum Charge will entitle the customer to the quantity of water which that minimum charge will purchase at the Quantity Rates.

Schedule No. 2

General Flat Rate Service

Applicability

Applicable to all water service furnished on a flat rate basis.

Territory

Portions of the incorporated cities of Anaheim, Barber City, Garden Grove, Huntington Beach, Midway City, Santa Ana, Stanton, Westminster, and adjacent territory, Orange County.

Rates

	Per Service Connection Per Month
1. Single family residence including premises not exceeding 10,000 sq. ft. in area	$4.50
(a) For each additional residence on the same premises and served from the same service connection	2.25
(b) For each 100 sq. ft. of area in excess of 10,000 sq. ft.	0.045
(c) For each swimming pool in addition to the regular flat rate	7.50
2. For each store, market or shop	4.50
3. For each service station	6.00
4. For each hospital, per bed	1.50
5. For each clinic, including premises, not exceeding 20,000 sq. ft. in area	52.50
(a) For each 100 sq. ft. of area in excess of 20,000 sq. ft.	0.045

Special Conditions

1. The above flat rate charges apply to service connections not larger than ¾-inch in diameter.

2. All service not covered by the above classifications will be furnished only on a metered basis.

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 501

DYKE WATER COMPANY,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California and to the Public Utilities Commission of the State of California

Brief in Opposition

The respondent Public Utilities Commission of the State of California (hereinafter called Commission) respectfully urges that the Petition for a Writ of Certiorari of Dyke Water Company (hereinafter called Dyke) be denied.

ARGUMENT

I. No Federal Question Was Properly Raised in the Supreme Court of the State of California.

The Petition (pp. 2, 4) rests the jurisdiction of this Court upon that part of 28 U.S.C. Section 1257 (62 Stat. 929)

empowers the Court to review final judgments of courts "by writ of certiorari . . . where any title, privilege or immunity is specially set up or claimed the Constitution . . . of the United States."

Petition then cites the "relevant section of the Four Amendment to the United States Constitution" as s:

No state shall make or enforce any law which shall bridge the privileges or immunities of citizens of the nited States; nor shall any state deprive any person f life, liberty or property without due process of law; or deny to any person within its jurisdiction the equal rotection of the laws."

areful scrutiny, however, of all the documents ad- d to the California Supreme Court[1] discloses no nce to the Fourteenth Amendment of the Constitution United States or any other part of that Constitution. are merely scattered allegations, such as that the ission's order constitutes "a confiscation of petition- roperty and fails to provide a fair return to peti- 's investment as required by law"; that it "denied to oner procedural due process of law and an opportunity fair hearing as required by law"; that petitioner will eprived of its property"; that the Commission's order tes a constitutional right of the petitioner"; and that ndings of the Commission that are material to the

[1] These documents are all set out in the Appendix to the Petition and are as follows:
Petitions for Writ of Certiorari or Review, Exhibit D, pp. 24-32;
Memorandum of Points and Authorities in Support of Petition for Writ of Certiorari or Review," Exhibit E, pp. 33-48;
Petitioner's Closing Brief, Exhibit F, pp. 49-66;
Petition of Dyke Water Co. for Rehearing of Decision Filed June 22, 1961, and Memorandum of Points and Authorities in Support Thereof, Exhibit H, pp. 97-106.

determination of the "constitutional question" are not determinative.

As stated in *Orleg State Co. v. Bather Co.*, 166 U.S. 648, 655; 41 L. ed. 1149, 1152: "The jurisdiction of this Court to re-examine the final judgment of a state court can not arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right."

This court will not take cognizance of a claim grounded upon mere references to a Constitution or to "due process of law."

Bond v. Scott, 233 U.S. 658, 664, 665; 58 L. ed. 1141, 1145.

"[I]t is well settled in this Court that it must be made to appear that some provision of the Federal, as distinguished from the State, Constitution was relied upon, and that such provision must be set forth."

New York Central and H.R.R. Co. v. New York, 186 U.S. 269, 273; 46 L. ed. 1158, 1160.

If it is merely alleged that a state law is "unconstitutional" or that it denies "constitutional rights," it will be assumed that references being made to the state constitution and rights thereunder rather than to the Federal Constitution.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 68; 73 L. ed. 184, 187.

If the state constitution has a due process clause, a claim that "due process" has been violated will be deemed to relate to that clause.

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[2] These allegations are to be found on the following pages in the Appendix to the instant Petition:

Pages 27, 28, 31, 36, 37, 38, 40, 41, 50, 64, 99, 105.

Bowe v. Scott, 233 U.S. 658, 664, 665; 58 L. Ed. 1141, 1145.

The Constitution of the State of California, Article I, Section 13, contains a "due process" clause, which is in material part as follows:

> "No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; . . ."

The California Supreme Court apparently did not believe that any question of a violation of the Constitution of the United States had been raised before it, there being no reference whatever to that Constitution in its Opinion (set out as Exhibit G, pp. 67-96 in the Appendix to the instant Petition).

Elliptical references to constitutional rights are not enough to invoke this Court's jurisdiction.

II. No Substantial Federal Question Is Presented by the Petition.

Even if it should be concluded that the Petitioner intended to and did properly raise in the California Supreme Court a question of a violation of its rights under the Fourteenth Amendment of the Constitution of the United States, nevertheless there is not sufficient substance in such a question to warrant this Court's attention.

The petition alleges violations of due process in both its substantive and procedural aspects. There is no merit in either contention.

A. SUBSTANTIVE DUE PROCESS.

(1) The Rate Order Was Not Confiscatory.

The opinion of the California Supreme Court refers to the evidence before the Commission that "Petitioner would earn for the year 1959 a return of 16.08%" under the chal-

lenged rates; to the evidence that the rates sought by petitioner in its application to the Commission would yield 31.48%; to the evidence of other high rates of return on other bases; and to the Commission's conclusion, together with the assumptions underlying such conclusion, that petitioner would earn a return of approximately 7% in 1960 and subsequent years (Petition, Appendix, pp. 85, 86, 90, 91).

The California Court's opinion also explains, in the light of the record, why such high rates of return were likely (Petition, Appendix, pp. 86-88). This explanation, briefly expressed, is that the Commission as a matter of policy, for rate-fixing purposes, does not recognize, and in this case did not recognize, as a part of rate base, plant constructed with interest free moneys advanced to the utility by real estate developers for extensions of the utility's water service into new subdivisions. The result is that Dyke's net income yields a high return on a small rate base. This policy was approved by the California Supreme Court (Petition, Appendix, p. 88).

The petition cites the case of *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602; 88 L. ed. 333 and says that the California Court's decision affirming the Commission's order "illustrates a complete disregard of the rationale of that and the other decisions of this Court"; and that the California Supreme Court "ignored the clear import of the many cases decided by this Court: that whatever the theory utilized by the agency setting the utility's rates, the end result must be just and reasonable." (Petition, p. 7)

But petitioner does not specify any grounds for its charge that the end result here was not just and reasonable, and no reason appears why Dyke's ratepayers should pay rates

to produce a return on money with respect to which Dyke has no obligation to pay interest or dividends.

The petition says that "The strongest evidence of the confiscatory nature" of the Commission's order is the "fact" that a local municipality had offered and petitioner had accepted the sum of approximately $7,000,000 for its system, coupled with the fact that Dyke's rates were reduced to the level prevailing in 1952 (Petition, p. 8).

But there is no evidence whatever in the record of any such price. Nor can it be made a part of the record by saying "It was never disputed". Nor is there any probative force in the fact that the Commission reduced Dyke's rates to their 1952 level.

(2) The Commission's Order with Respect to Metering Was Neither Confiscatory, Unreasonable, Nor Beyond Its Jurisdiction.

The opinion of the California Supreme Court describes the long history lying behind the Commission's order that Dyke install meters (Petition, Appendix, pp. 75-84). This history shows that for a long time there has been an urgent need for metering water in the Southern California area, in which Dyke serves, in order to prevent waste and discrimination; that in 1957 when seeking, on other grounds, review by the California Supreme Court of a prior Commission decision in which it was ordered that meters be installed on its system, Dyke did not question such order; that Dyke's own witness testified that meters are essential; that when Dyke was seeking a rate increase, its own president testified that a program of meter installation was feasible and would not impose any undue financial burden upon Dyke; that Dyke sent to the Commission periodic progress reports with respect to its metering program; and that after rate relief was granted by the Commission, Dyke renounced the metering program. The evidence shows that

Dyke's conduct with respect to metering has been marked by dilatoriness and bad faith.

As the California Supreme Court said, "At this late date, petitioner is hardly in a position to complain that the Commission's order on March 22, 1960, is impossible or unreasonable." (Petition, Appendix, p. 36)

Presumably this Court is not concerned with whether or not the Commission's meter order was within its jurisdiction, there being no federal question involved.

In any event, the California Supreme Court concluded that such an order was within the Commission's jurisdiction under California law (Petition, Appendix, pp. 30-34).

B. PROCEDURAL DUE PROCESS.

(1) The Commission's Denial of Dyke's Petition for Rehearing Violated No Right of Petitioner Under the Constitution of the United States.

Dyke complains that it should have been afforded an opportunity upon rehearing to present evidence of its actual operating expenses and revenues for the years 1958 and 1959, which it says "was unavailable at the time of the hearings" (Petition, p. 6).

In truth, Dyke itself presented evidence of its actual operating expenses and revenues for 1958 (See Petition, Appendix, p. 116).

There was no duty on the Commission to grant rehearing to hear evidence pertaining to 1959 operations occurring after the record was closed.

Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 514, *et seq.*; 88 L. Ed. 1420.

(2) The Commission's Rejection of the Examiner's Conclusions After Adopting Certain of His Findings Violated No Right of Petitioner Under the Constitution of the United States.

The petitioner does not demonstrate how any of its constitutional rights were infringed by the Commission's

adopting certain of the Examiner's findings but rejecting his conclusions and reaching different ones.

Even if it should be assumed that such a fact raised a federal question, such a question has been settled by this Court in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 492; 95 L. ed. 456, 470, and *Federal Communications Commission v. Allentown Broadcasting Corporation*, 349 U.S. 358, 364; 99 L. ed. 1147, 1154.

These and other cases are commented upon in Davis, Administrative Law Treatise, Volume II, Section 10.04.

These cases make it clear that this Court recognizes the right of administrative agencies to reach results differing from those of their hearing officers, provided those results are supported by substantial evidence in the record, including the Examiner's report. There was substantial evidence here that Dyke would earn a return approximating 7% as determined by conventional methods of rate making.

(3) The Commission's Denial of Dyke's Request for Oral Argument Violated No Right Under the Constitution of the United States.

After the Examiner's proposed report was filed, the petitioner availed itself of its right under the Commission's Rules of Procedure to file exceptions thereto, and a reply to exceptions filed by others.

"Argument may be oral or written. The requirements are not technical."

Morgan v. United States, 298 U.S. 468, 481; 80 L. ed. 1288.

To the same effect is *Federal Communications Commission v. Station WJR*, 337 U.S. 265, 275; 93 L. ed. 1353.

Proposed reports and allowing of the filing of exceptions thereto have been referred to by this Court as "good practice".

Morgan v. United States, 304 U.S. 1, 21; 82 L. ed. 1129, 1134.

III. Conclusion.

The petition for a writ of certiorari should be denied for the reasons:

(1). It did not properly raise any federal question in the California Supreme Court, whose decision is here challenged;

(2). Even if such a question were properly raised in that Court, the petition presents to this Court no substantial question of any violation by the California Supreme Court or by the Commission of any right of petitioner under the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted.

WILLIAM M. BENNETT
Chief Counsel

J. THOMASON PHELPS
Principal Counsel

Attorneys for Respondent Public Utilities Commission of the State of California.

Dated: November 10, 1961.

IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 501

DYKE WATER CO.,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION.

In support of its petition for a writ of certiorari, petitioner, Dyke Water Co., submits the following reply or supplemental brief pursuant to the provisions of Rule 24(4).

ARGUMENT.

I.

A Federal Question Was Raised Throughout the Proceedings Below.

A Federal Question was appropriately raised by petitioner at every stage of the proceedings after issuance of the opinion and order of the respondent Commission sought to be reviewed by this court. In the first pleading filed by petitioner following the issuance of Decision No. 49828 of the Public Utilities Commission of the State of California, petitioner expressly alleged

that "The opinion and order [Decision No. 49828, of the respondent Commission] constitutes a violation of the Federal and California State Constitutional guarantees against taking of privately owned property without compensation. . . ." (Ex. "B," p. 13, Petition for Writ of Certiorari) and that the opinion and order of the respondent Commission was arbitrary and capricious and constituted ". . . a violation of Federal and California State Constitutional guarantees of due process of law." (Ex. "B," p. 14, Petition for Writ of Certiorari.) The petition addressed to the California Supreme Court for a writ of certiorari or review (Ex. "D," p. 24, Petition for Writ of Certiorari) expressly incorporated the petition for rehearing before the respondent Commission. (Ex. "D," p. 27, Petition for Writ of Certiorari.) The allegation of the brief in opposition that no Federal Question was raised by petitioner is, therefore, directly controverted by the record before this Court.

II.

Substantial Federal Questions Are Presented by the Petition.

The unexplained refusal of the respondent Commission to follow the recommendations of its own hearing officer raises a substantial Federal Question on which there are conflicts in the reported decisions of the courts of the United States. The brief in opposition attempts to catagorize the issuance by the respondent Commission of an opinion and order contrary to the recommendations of its own hearing officer as a "procedural" question. However, wholly apart from any procedural irregularity, such action by the respondent Commission

raises issues of substantive due process, since one question raised by the petition for writ of certiorari is whether the rates ordered by the respondent Commission are confiscatory and thus constitute a denial of due process of law to petitioner. If the opinion and order of the respondent Commission is unsupported by substantial evidence, its action is arbitrary and capricious and must be reversed by the Courts.

Throughout the proceedings below, petitioner contended that evidence which would otherwise support the opinion and order of the respondent Commission is, as a matter of law, rendered *insubstantial* by the fact that the preponderance of the evidence supports the recommendation of the hearing officer. (Ex. "F," p. 55, Petition for Writ of Certiorari.) The respondent Commission and the court below ignored this contention, and the respondent Commission cites *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474 (1951) and *Federal Communications Commission v. Allentown Broadcasting*, 349 U. S. 358 (1955) as authority for the proposition that an administrative agency is free to adopt a decision contrary to that of its hearing officer regardless of the evidence supporting the hearing officer's determination. However, both cases cited deal with the question of what effect the contrary determination of the hearing officer has on the evidence which would otherwise support the decision of the administrative agency. As stated in *Davis*, Administrative Law Treatise, Vol. 2, page 25, § 10.04, "Several cases since the *Allentown* decision show that the Courts of Appeals are going along with the idea that the agency may reverse the examiner even on questions of credibility. Even so, it is still possible for a reviewing court to

reject an agency's findings and adopt those of the examiner as is shown by In re United Corporation." (See *In re United Corporation*, 249 F. 2d 168, 178 (3rd Cir. 1957).) In the latter class of cases, the courts have followed the express language of the Court in *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 F. 2d 786, 789-790 (7th Cir. 1951)

> ". . . it is the duty of this Court to examine the record as a whole, *including the report of the examiner*, in order to determine whether the evidence supporting the Commission's order is substantial . . . *Evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.* The findings of the examiner are to be considered . . . The foregoing facts fully establish the examiner's finding . . . and they outweigh the facts relied upon by the Commission in reaching the opposite conclusion. And while the findings of an examiner are not as unassailable as a master's [Citation] *where it appears from the record that they are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary. Folds v. Federal Trade Commission* (7th Cir., 187 F. 2d 648, 661." (Emphasis added.)

Although an administrative agency has the right to reach conclusions differing from those of its hearing officer, there is substantial conflict among the courts of the United States as to the consequence of a contrary determination by the hearing officer on the ba-

sis of evidence which might otherwise support the administrative agency's action. (Compare *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, *supra*, 191 F. 2d 786 (7th Cir. 1951); *In re United Corporation*, *supra*, 249 F. 2d 168 (3rd Cir. 1957); and *A. E. Staley Mfg. Co. v. National Labor Relations Board*, 117 F. 2d 808 (6th Cir. 1941) with *N. L. R. B. v. Klein Products Co.*, 200 F. 2d 109 (5th Cir. 1953); *Utica Observer Dispatch v. N. L. R. B.*, 229 F. 2d 575 (2nd Cir. 1956); and *Pierce v. S. E. C.*, 239 F. 2d 160 (9th Cir. 1956).)

Conclusion.

The petition for a writ of certiorari raises substantial questions of violations of the rights of petitioner conferred by the 14th Amendment to the Constitution of the United States. The Federal Questions presented are of national significance, and are of vital concern to every public utility regulated and controlled by the respective governments of the several States.

It is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

ARLYNE LANSDALE,
RICHARD P. ROE,
CRIS S. REELAS,
EDGAR PAUL BOYKO, and
FREDERICK L. SIMMONS,

By FREDERICK L. SIMMONS,

Attorneys for Petitioner.

NOV 23 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 501

DYKE WATER CO.,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION.

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